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Supreme Court of the United States

SCOTT WILKINSON, IN HIS INDIVIDUAL CAPACITY AND AS EXECUTOR OF THE ESTATE OF JASON SCOTT WILKINSON; ALISHA WHITE, AN INDIVIDUAL; ESTATE OF JASON SCOTT WILKINSON, PETITIONERS

v.

RICK TORRES, INDIVIDUALLY AND AS CITY OF VANCOUVER POLICE OFFICER

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED

1. Is it objectively reasonable for a police officer to believe that the risks presented by an unarmed driver of a minivan hemmed in by police justified deadly force by shooting him eleven times with two separate volleys where a rational jury could find from the evidence, viewed in the light most favorable to petitioners, that he presented no imminent threat of physical harm after a vehicular chase and where the second volley of four deadly shots took place after the driver was already slumped over the steering wheel, having lost consciousness or suffered mortal injuries?

2. When the court of appeals decides disputed fact questions on summary judgment to conclude that respondent was entitled to qualified immunity for shooting the driver of a minivan eleven times with two separate volleys, has it overstepped its role as a reviewing court, undermined summary judgment procedure and denied petitioners the jury trial they deserved?

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OPINIONS BELOW

The published decision of the United States Court of Appeals for the Ninth Circuit in *Scott Wilkinson et al. v. Torres* (C.A. No. 09-35098), reported at 610 F.3rd 546(9th Cir. 2010), decided July 6, 2010, reversing the District Court's interlocutory Order denying on the grounds of qualified immunity respondent Torres' motion for summary judgment in petitioners' suit for damages in this civil rights action, instead concluding that respondent Torres was entitled to summary judgment based on qualified immunity, is set forth in the Appendix hereto(App. 1-23).

The unreported interlocutory Order of the United States District Court for the Western District of Washington at Tacoma, in *Scott Wilkinson et al. v. Rick Torres et al.*(Civil Action No. CV 08-5281 BHS), decided January 23, 2009, denying respondent Torres' summary judgment motion on the grounds of his qualified immunity in petitioners' civil rights action for damages for his unreasonable use of deadly force, is set forth in the Appendix hereto(App. 24-48).

The unpublished order of the United States Court of Appeals for the Ninth Circuit in *Scott Wilkinson et al. v. Torres*(C.A. No. 09-35098), filed on September 7, 2010, denying petitioners' timely filed petition for rehearing *en banc*, is set forth in the Appendix hereto(App. 49).

JURISDICTION

The decision of the Circuit Court of Appeals for the Ninth Circuit reversing the District Court's

interlocutory Order denying on the grounds of qualified immunity respondent Torres' motion for summary judgment in petitioners' suit for damages in this civil rights action was entered on July 6, 2010; and its order denying petitioners' timely filed petition for rehearing *en banc* was filed on September 7, 2010(App. 1;49). This petition for writ of certiorari is filed within ninety (90) days of the date of the court of appeals' denial of petitioners' timely filed petition for rehearing *en banc*. 28 U.S.C. § 2101(c). Supreme Court Rule 13.3. The jurisdiction of this Court is invoked pursuant to the provisions of 28 U.S.C. § 1254(1).

RELEVANT PROVISIONS INVOLVED

United States Constitution, Amendment IV:

> The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath, or affirmation, and particularly describing the place to be searched, and the persons or things to be seized.

United States Constitution, Amendment V:

> No person shall...be deprived of life, liberty, or property, without due process of law....

United States Constitution, Amendment VII:

> In Suits at common law, where the value in controversy shall exceed twenty dollars, the

> right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law.

United States Constitution, Amendment XIV, § 1:

> ...No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any state deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

28 U.S.C. § 1331:

> The district courts shall have original jurisdiction of all civil actions arising under the Constitution, laws, or treaties of the United States.

28 U.S.C. §§ 1343(a)(3) & (4):

> (a) The district courts shall have original jurisdiction of any civil action authorized by law to be commenced by any person:
>
> ...
>
> (3) To redress the deprivation, under color of any State law, statute, ordinance, regulation, custom or usage, of of any right, privilege or immunity secured by the Constitution of the United States or by any Act of Congress providing for equal rights of citizens or of all persons within the jurisdiction of the United States;

> (4) To recover damages or to secure equitable or other relief under any Act of Congress providing for the protection of civil rights, including the right to vote.

Civil Rights Act–42 U.S.C. § 1983:

> Every person who under color of any statute, ordinance, regulation, custom, or usage, of any State or Territory or the District of Columbia, subjects, or causes to be subjected, any citizen of the United States or other person within the jurisdiction thereof to the deprivation of any rights, privileges, or immunities secured by the Constitution and laws, shall be liable to the party injured in an action at law, suit in equity, or other proper proceeding for redress....

Fed. R. Civ. P. 56(c) and (e)(2):

> **(c). Serving the Motion; Proceedings.**
> ....The judgment sought shall be rendered forthwith if the pleadings, depositions, answers to interrogatories, and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.
> ....
> **(e)(2). Affidavits; Further Testimony.**
> ....*Opposing Party's Obligation to Respond.* When a motion for summary judgment is properly made and supported, an opposing party may not rely merely on allegations or denials in its own pleading; rather, its response must—by

affidavits or as otherwise provided in this rule---- set out specific facts showing a genuine issue for trial. If the opposing party does not so respond, summary judgment should, if appropriate, be entered against that party.

STATEMENT

At about11:20 AM on the morning of Sunday, May 8, 2005, Vancouver Police Officer John Key ("Key") while on patrol identified an occupied minivan parked in front of a known crack house in the 3300 block of "T" Street in Vancouver, Washington. Key exited his cruiser, approached the vehicle and attempted to identify the driver of the minivan. The driver was Jason Scott Wilkinson ("Jason"), a seventeen year-old boy, who was driving the minivan without the authority of the person with whom he was living.

Jason ignored Key's attempt to communicate with him, crouched down to retrieve a tool and used it to start the minivan, driving away northbound along "T" Street about six blocks where he turned onto 39th Street. Key pursued Wilkinson and called dispatch for a check on the minivan's licence plate; the check came back to a stolen minivan. Respondent Police Officer Rick Torres ("respondent" or "Torres") was monitoring these radio transmissions and drove to where the pursuit was heading on 39th Street. He positioned his cruiser on the south side of the intersection at 39th Street and "P" Street and waited for Jason and Key to pass by him.

As Jason and Key approached him along 39th Street, Torres could see that Jason and Key were traveling slowly, about 25 or 30 miles per hour. Jason turned the minivan north onto "P" Street and then immediately onto SR 500. Torres followed both of them as they traveled eastbound in the far left hand lane of travel on SR 500. As Jason's minivan turned left off of SR 500 onto St. John's Avenue, Torres assumed the first position behind the minivan. Key instructed Torres to "PIT" the minivan when given the chance. A PIT (Pursuit Immobilization Technique) maneuver is accomplished by steering the right front part of the pursuing vehicle into the left rear side of the target vehicle, causing the target vehicle to skid, spin out or come to a stop(App. 27).

The three vehicles traveled between 35 and 40 mph in the left lane of St. John's Avenue; Jason was not pulling away from Torres and they passed one or two other vehicles with none of these passed vehicles having to take evasive action. Jason slowed in order to turn the minivan left onto 49th Street and Torres decided to PIT the minivan there. As a result of this PIT maneuver by Torres, the minivan's back end fishtailed as it went through the turn and made contact with another vehicle as it sat at the traffic light in the westbound lane of 49th Street, causing the minivan to travel onto the sidewalk of 49th Street.

Once back onto 49th Street, Jason drove the minivan about 35 to 40 mph in a 25 or 30 mph zone. The road was dry and there were no pedestrians or other vehicles present. Jason repeatedly braked the minivan as if he didn't know where to go. He turned left onto 40th Avenue from 49th Street. As he did so, Torres

executed another PIT maneuver, and then another, causing both Torres' cruiser and the minivan to end up in the side yard of the residence at 3912 NE 49th Street. Torres saw the minivan begin to move very slowly (10-12 mph) through the trees in the yard and he lost sight of it as it drove around the corner of the residence. Torres exited his patrol car, drew his firearm and ran in the direction of the minivan; he saw Key also approaching the minivan on foot. Once around the corner of the house, Torres saw that the minivan's front had collided with a telephone pole.

. Anthony Davis("Davis"), a motorist who had witnessed Torres' two PIT maneuvers on Jason's minivan at the corner of 49th Street, pulled his vehicle over to the shoulder of the road in front of the residence of 3912 NE 49th Street. He witnessed the ensuing events. In addition, Clark County Sheriff Deputy Scott Schanaker (Schanaker"), assisting in this incident, had brought his cruiser to a stop next to the telephone pole which the minivan hit. He also witnessed the ensuing events.

With Jason's minivan hemmed in by the police cruisers of Torres, Key and Schanaker, Torres and Key approached the minivan from its driver's side as it rested against the telephone pole. Key tried to open the driver's side door but slipped on the wet grass and fell on his backside. Key was on the ground for only a moment or two before regaining his feet; he then walked around to the front of the minivan. Key was standing in front of the minivan as Jason put the vehicle in reverse and slowly began to back *away* from both him and the telephone pole in a big semi-circle toward the home.

Torres (with his firearm drawn) and Key were close to each other and within each other's line of sight the entire time. Both made eye contact and acknowledged each other as the minivan began to back away slowly with its tires spinning from Key and the telephone pole. As the minivan was about fifteen (15) feet away from the telephone pole and from Key, *backing away from Key*, Torres walked to the front passenger window of the slowly moving minivan and fired his weapon repeatedly into the minivan directly at Jason, a first volley consisting of seven shots.

As Torres began shooting his weapon directly at Jason, his (Jason's) hands were located at positions 10 and 2 o'clock on the minivan's steering wheel. Schanaker saw Torres' rounds enter Jason's body, head, and neck area; and he saw Jason's body react to the impact of the bullets hitting him. After being shot several times, Jason's hands fell from the steering wheel, the engine continued to rev as if Jason's foot was stuck on the accelerator and then the minivan continued to coast backward at a slow rate of speed.

Seconds later, Torres fired a second volley of four shots directly at Jason as he lay on the steering wheel. When Torres stopped shooting, he had fired eleven (11) rounds at Jason, hitting him ten (10) times. Schanaker then reached through the driver's window and handcuffed Jason, checking his vital signs. He did not feel a pulse or any breathing. The Report of the Medical Examiner found that Jason died of "multiple gunshot wounds"(App. 33).

During this entire incident which both Davis and Schanaker witnessed, Officer Key sustained no injuries

as a result of any action taken by Jason or the minivan. He was not struck, bumped or knocked over by the vehicle. Key fell because, according to percipient witness Davis, he "slipped on the wet grass" while trying to open the driver's side door, *not* because of Jason's operation of the minivan; and Davis saw Key "jump[ ] back up" and "jump[ ] out of the way of the car so he wouldn't get ran [sic] over" as Jason tried to back away from Key and the telephone pole(App. 32).

Moreover, according to Davis, when Torres started firing his weapon into the minivan at Jason, neither Torres nor Key was in any danger of being run over or otherwise injured by the minivan, as Key was standing in front of the minivan which was moving *away* from him and the telephone pole. The accident reconstructionist further determined that the nature of the minivan's tire tracks together with the glass patterns found on the path as it backed up demonstrated that "three shots were fired [at Jason] *after* there was no longer power in the minivan"(App. 33)(emphasis supplied).

Finally, the transcript of police radio transmissions throughout this episode makes clear that Key characterized this event as a "failure to yield" by Jason rather than an "elude" or "pursuit." Torres never described Jason as driving recklessly or negligently; the entire event lasted about three minutes over a distance of approximately two miles; and this ongoing apprehension of Jason and the minivan was so unremarkable that neither Torres nor Key requested permission from their supervisor to engage in a "pursuit."

In the aftermath of these events, Jason's parents, Scott Wilkinson and Alisha White, together with Jason's Estate("petitioners"), brought this civil action in federal district court on May 2, 2008, against respondent Torres, Officer Key, Chief of Police Brian Martinek, the City of Vancouver and unknown others seeking damages under 42 U.S.C. § 1983, because of Torres' unjustified, objectively unreasonable and excessive use of deadly force which resulted in Jason's death. Petitioners posited the jurisdiction of the district court on 28 U.S.C. §§ 1331 and 1343(a)(3) & (4).

Petitioners alleged that Torres violated their constitutional rights under the fourth and fourteenth amendments when without justification or legal authority he shot and killed Jason, an unarmed 17-year-old, for the commission of a non-violent Class C felony of attempting to elude a police officer and possession of stolen property in the second degree, neither crime inherently dangerous requiring his immediate apprehension. They also claimed that Officer Key failed to prevent Torres' unconstitutional use of force; that Martinek neglected his supervisory responsibility as Police Chief in failing to prevent this violation of the Police Department's policies, procedures and guidelines; and that the City was liable for maintaining a custom or practice of ignoring or encouraging such misconduct.

Petitioners sought compensatory and economic damages on behalf of Jason himself, Jason's Estate and themselves as his surviving next of kin; punitive damages against Torres, Key and Martinek because of their reckless and callous indifference for Jason's life;

an award of their attorney's fees; and a jury trial on all issues.

Before discovery began and following the dismissal of petitioners' claims against Police Chief Martinek, both Torres and Key moved for summary judgment in their favor because of their qualified immunity from suit and because the petitioners' claims as Jason's parents were not "viable" (App. 37). The gist of their argument was that Torres acted reasonably in using deadly force when, viewed objectively, the evidence showed that it was the culmination of a high-speed, dangerous chase involving Jason's erratic driving, at least two PIT maneuvers by Torres and Jason's ultimate crash into a telephone pole. Moreover, even though Jason momentarily lost consciousness as a result of the collision, he regained his senses and refused to give up his operation of the minivan, attempting to back it away and escape from two uniformed officers with their weapons drawn. Finally, because of Jason's conduct, both Torres and Key suspected that he was armed; and Torres reasonably believed that Jason's operation of the minivan endangered Officer Key. Key further argued that he had no opportunity to intervene in order to prevent Torres' shooting of Jason.

Petitioners opposed the motion with their own proof which demonstrated that neither Torres nor Key considered this a high-speed pursuit; that Jason's operation of the minivan did not endanger the public except when Torres attempted to PIT his vehicle; that neither Torres nor Officer Key was endangered by the minivan slowly moving away from Officer Key and the telephone pole; that Torres fired his first volley of

seven shots for no reason related to Officer Key or himself being endangered or to Jason being armed; and that Torres' second volley of four shots seconds later took place *after* the minivan had lost power, as Jason lay on the steering wheel, either unconscious or already mortally wounded, no threat to anyone.

On January 23, 2009, the district court, Settle, J., issued his interlocutory Order denying Torres' motion for summary judgment but granting Key's motion on the grounds that he had no reasonable opportunity to assess the situation and intervene in this shooting which took place in a few seconds(App. 24-48). As for Torres, the district judge found that, viewing the facts in the light most favorable to petitioners, an issue of material fact exists for trial whether Jason posed an "imminent threat of death or seriously bodily harm" when Torres fired four bullets at Jason "after there was no longer power to the minivan" and it had stopped accelerating(App. 41).

Moreover, contrary to Torres' assertions, Judge Settle found that it was *undisputed* that when Torres began firing his first volley of seven shots at Jason, the minivan "was *always* moving in a backward direction *away from* Officer Key"(App. 41)(emphasis supplied). That is, given the statements of percipient witnesses, the minivan would have had to avoid the telephone pole and Schanaker's cruiser "before it could have threatened Officer Key"(App. 41-42). Indeed, as eyewitness Davis observed, while Torres was shooting, Key had *already* reached his feet and was "out of the way of the car so he wouldn't get ran [sic] over"(App. 41).

Complicating the record further was Torres' contradictory statements about why he fired a second volley of four bullets at Jason: he first said he did so after the minivan had stopped; and he then asserted that he did so because the first volley had no effect on Jason(App. 31). In addition, Torres' story that he fired to protect Officer Key who had been knocked to the ground by the minivan was undercut by eyewitness Davis who saw Key slip on the wet grass—he was *not* hit by the minivan---and jump right up and out of the way so that he was in no danger of being run over(App. 31-32).

Because material questions of fact exist on this record whether Jason posed an imminent threat throughout the shooting that would justify the use of deadly force, the district judge denied Torres' summary judgment motion(App. 41). The district court finally determined that petitioners' proof presented facts from which a reasonable factfinder could conclude that Torres intended to harm, terrorize or kill Jason for reasons unanchored by any legitimate law enforcement objective, thereby giving his petitioner parents a right to recover for the loss of the society and companionship of their son under the Fourteenth Amendment due process clause(App. 45-48).

As Judge Settle found, petitioners had adduced proof that

> ...Torres walked to the passenger side of the minivan and effectively executed [Jason] by shooting him eleven times at close range. Torres shot [Jason] when the minivan was traveling at a slow speed in the exact opposite direction from

> where Key stood. Even after [Jason] dropped his hands from the steering wheel and slumped in the driver's seat mortally wounded, Torres continued to fire into [Jason] as the minivan coasted in reverse.

(App. 47-48).

Upon Torres' appeal, a majority of the court of appeals reversed the district court's ruling, concluded that Torres' use of deadly force was reasonable as a matter of law and ordered that his summary judgment motion be granted based on qualified immunity(App. 1-15). It also denied the petitioner parents any recovery for the loss of society and companionship of their son under the Fourteenth Amendment due process clause(App. 13-15).

In reaching this result, the majority repeatedly made crucial fact determinations in Torres' favor at odds with the summary judgment record, crediting Torres' one-sided version of events at every turn. It discounted petitioners' proof that as Torres began firing his first volley of seven shots at Jason, the minivan was *always* moving in a backward direction *away from* Officer Key, not endangering him; that when Torres fired his second volley of four shots at Jason, it was *after* the minivan had lost power, it had stopped accelerating and Jason lay slumped across the steering wheel; and that Torres' contradictory statements about why he fired his second volley at Jason bespeaks fabrication and dissembling fit for a jury's assessment.

Instead of construing the facts in the light most favorable to petitioners, the majority immediately credited Torres' claim that when he began firing at Jason through the passenger window with his first volley, he believed that Officer Key "had been run over" or that his "fellow officer was nearby either lying fallen on the ground or standing but disoriented"(App. 4;7-8). In fact, as the district judge found, it was *undisputed* that when Torres fired his weapon at Jason, the minivan "was *always* moving in a backward direction *away from* Officer Key" who was standing in the front of the minivan(App. 41)(emphasis supplied). As eyewitness Davis observed, when Torres began shooting, Key had *already* reached his feet and was "out of the way of the car so he wouldn't get ran [sic] over"(App. 31-32;41). The majority's belief that no facts in the record contradicted Torres' self-serving claim that he believed Key had been run over(App. 8) is belied by petitioners' evidence adduced in the district court and referenced by Judge Settle in his Order(App. 31-32;41).

The majority also ignored the forensic evidence of the tire tracks and glass fragments which showed that by the time Torres fired his second volley of four shots seconds later, the minivan had *already* lost power, Jason lay on the steering wheel, either unconscious or already mortally wounded, presenting no threat to anyone. Instead, it concluded that even after Torres had fired this second volley, the minivan (with Jason presumably still alive and still driving under the majority's version of the facts) continued to arc "dangerously" around Torres, "eventually" slowing down(App. 8;10). This conclusion does not jibe with petitioners' proof that Officer Schanaker saw Jason's

hands fall from the steering wheel after Torres' first volley, the minivan continuing to coast backward at a slow rate of speed and then, seconds later, Torres firing another four rounds directly at Jason as he lay on the steering wheel(App. 32).

The majority concluded that "[b]ecause the van could have arced around to run over Key or Torres, or stopped and pulled forward with the same effect, Torres' fear for the safety of himself or others was reasonable"(App. 10). Yet this conclusion doe not accommodate the forensic evidence that the nature of the minivan's tire tracks together with the glass patterns found on the path as it backed up demonstrated that at least "three shots were fired [at Jason] *after* there was no longer power in the minivan"(App. 33)(emphasis supplied). Nor is this conclusion consistent with Torres' own admission that he fired this second volley after the minivan had stopped or lost power(App. 31). Instead, the majority chose another part of Torres' contradictory testimony to conclude that he shot the second volley of four shots because Jason had *not* stopped the minivan(App. 11-12).

District Judge Marshall, sitting by designation, dissented(App. 16-23). She first determined that the court of appeals lacked jurisdiction under *Johnson v. Jones*, 515 U.S. 304, 317-320(1995) and *Mitchell v. Forsyth*, 472 U.S. 511, 530(1985), to hear Torres' appeal because his claim of qualified immunity turns *not* on issues of law but unresolved issues of fact founded on his own version of events which the appellate court should not credit on this record(App. 17-18).

Were Judge Marshall to accept jurisdiction, she would affirm the district court's denial of Torres' summary judgment motion because when viewed the light most favorable to petitioners, the facts adduced below create material questions of fact for a jury whether Torres acted reasonably in firing his first volley of seven shots or his second volley of four shots at Jason(App. 18-23). Specifically, the proof of eyewitness Davis suggests that the van never hit Key, that he slipped on the wet grass instead and regained his feet quickly, and that he walked to the front of the van before it began moving backward *away from him* and the telephone pole(App. 19-20).

Davis also stated that Torres and Key made eye contact and acknowledged each other *before* Torres started shooting his first volley of shots at Jason, undermining Torres' claim—adopted by the majority—that he thought that Key had been run over by the minivan and that Jason posed a threat of serious physical harm to him or Key(App. 20-21). None of these crucial fact questions could be resolved on summary judgment(App. 21).

Nor could an appellate court properly decide on this record whether Torres' second volley of shots was reasonable(App. 21-22). Davis told police that immediately after Torres' first volley, he saw Jason slump into his seat and his hands drop from the steering wheel to his side(App. 21). Yet two seconds later, Torres fired *four more shots* at Jason(App. 21). As Judge Marshall concluded, "[t]wo seconds is sufficient time from which a jury could find that a reasonable officer on the scene could have glanced over at the vehicle, seen that [Jason] had been shot and that

his hands were no longer on the wheel, and forgone the use of deadly force"(App. 22). Moreover, Torres himself conceded in part of his testimony that Jason had stopped the minivan after his first volley----*yet he again fired at him twice*(App. 21-22).

Because a jury should resolve these material fact questions, the dissent concluded that Torres' summary judgment motion was rightly denied (App. 22-23). For the same reasons, it determined that the petitioner parents had a right to recover for the loss of the society and companionship of Jason under the Fourteenth Amendment due process clause(App. 23).

On September 7, 2010, the court of appeals denied petitioners' timely filed petition for rehearing *en banc*(App. 49).

REASONS FOR GRANTING THE PETITION

1. The Ninth Circuit Has Dramatically Departed From This Court's Bedrock Principles of Qualified Immunity By Ruling That It Was Objectively Reasonable For Respondent To Use Deadly Force Against The Driver Of A Minivan Where He Presented No Threat To Respondent Or His Fellow Police Officer After A Vehicular Chase And Where Respondent's Second Volley Of Four Deadly Shots Took Place After The Driver Was Already Slumped Over The Vehicle's Steering Wheel, Having Lost Consciousness Or Suffered Mortal Injuries.

To endorse Torres' chosen course of action---- firing eleven rounds in two separate volleys upon an

unarmed civilian, the last four shots when he was already wounded or dead while slumped over the steering wheel of the minivan he was driving---- would be to say that a police officer may reasonably fire repeatedly upon an unarmed, wounded citizen even when the vehicle he was driving presented no threat of imminent harm to him or his fellow officer and where alternative courses of action were available to him to avoid this result, e.g., shooting out the minivan's tires, otherwise disabling the vehicle with non-deadly force or abandoning the chase.

The majority's decision establishes such a rule, one so completely at odds with the accepted standards of reasonableness enunciated by this Court and inferior federal courts for assessing a police officer's use of deadly force that it invokes this Court's supervisory power in order to reaffirm that under the law of this Court, the facts adduced below, if believed by a rational factfinder, would amount to a constitutional injury by Torres for which petitioners may seek compensation under § 1983. *Klapprott v. United States*, 335 U.S. 601, 611 (1949) (Black, J.) citing *McNabb v. United States*, 318 U.S. 332, 341(1943).

Apprehension by deadly force is a seizure subject to the reasonableness requirement of the Fourth Amendment. *Tennessee v. Garner*, 471 U.S. 1, 7(1985). In *Graham v. Connor*, 490 U.S. 386, 396-397 (1989), this Court set out the prevailing principles for assessing reasonableness when police officers use deadly force to apprehend a suspect:

> The "reasonableness" of a particular use of force must be judged from the perspective of a

> reasonable police officer on the scene, rather than with the 20/20 vision of hindsight....The calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments----in circumstances that are tense, uncertain, and rapidly evolving----about the amount of force that is necessary in a particular situation.
>
> ....
>
> [I]ts proper application requires careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight.
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> ....
>
> [T]he "reasonableness" inquiry is an objective one: the question is whether the officers' actions are "objectively reasonable" in light of the facts and circumstances confronting them, without regard to their underlying intent or motivations.

Id. at 396-397. Subsequent decisions by the Court in *Pearson v. Callahan*, 555 U.S. ___, 129 S.Ct 808(2009) and *Scott v. Harris*, 550 U.S. 372, 381-384(2007) have not disturbed *Graham's* bedrock principles for assessing reasonableness.

As for Torres' claim that when he started firing his first volley of seven shots at Jason, he thought that Officer Key had been run over by the minivan and was therefore in danger, both *Garner*, 471 U.S. at 3, and *Graham v. O'Connor*, *supra*, make the point that the significance of the threat is *not* dependent upon what

the officer says it is but rather upon an objective analysis of the available facts which could constitute probable cause to hold such a belief. There is no question that an automobile can inflict deadly force and under certain circumstances can constitute the type of threat that justifies an officer shooting the driver. See, e.g.., *Pace v. Capobianco*, 283 F.3d 1275, 1282(11th Cir. 2002); *U.S. v. Aveles-Rosales*, 832 F.2d 1155, 1157(9th Cir. 1987), *cert. denied*, 484 U.S. 1077(1988). However, viewing the evidence in the light most favorable to petitioners, this was *not* such a circumstance.

A rational jury could find from the evidence that this car chase started on a late Sunday morning on clear, dry roads with light traffic. It lasted for about three minutes and covered a distance of two miles. The speed of Jason's minivan and the police cruisers never went over 45 mph and never exceeded the posted speed limits by more than 5-10 mph; no other vehicles on the highway were forced to take evasive action; and it contained none of the danger, speed or recklessness of the "Hollywood-style car chase" which this Court saw on the videotape in *Scott v. Harris*, 550 U.S. at 379-380. Torres' ill-advised PIT maneuver forced the minivan to bump another vehicle at one point but neither Torres nor Key radioed that they were in the midst of a "pursuit," high speed or otherwise, only that they had a "failure to yield." This was not a "high-speed" chase; nor did it threaten the lives of innocent bystanders or other motorists.

A reasonable factfinder could also have found that once the minivan was hemmed in by the police cruisers of Torres, Key and Schanaker, Torres and Key approached the minivan as it rested against the

telephone pole. Key tried to open the driver's side door but slipped on the wet grass and fell on his backside, immediately regaining his feet. He then walked around to the front of the minivan as Jason put the vehicle in reverse and slowly began to back *away* from both him and the telephone pole in a big semi-circle toward the residence. As Judge Marshall noted, eyewitness Davis' statements suggest that the minivan never hit Key and that Jason put the vehicle in reverse in order "to *prevent* hitting Key"(App. 20-21)(emphasis in original).

A jury could also have rationally found that at the point Torres began firing his first volley at Jason, Torres and Key were close to each other and within each other's line of sight. Both made eye contact and acknowledged each other as the minivan began to back away slowly with its tires spinning from Key and the telephone pole. As the minivan was about fifteen (15) feet away from the telephone pole and from Key, *backing away from Key*, Torres walked—not ran---to the front passenger window of the slowly moving minivan and fired his weapon repeatedly into the minivan directly at Jason, a first volley consisting of seven shots.

A jury could have concluded further that as Torres began shooting his weapon directly at Jason, his (Jason's) hands were visibly located at positions 10 and 2 o'clock on the minivan's steering wheel, a position of hands which negated his use of any weapons. After being shot several times by Torres, his hands fell from the steering wheel, the engine continued to rev and then the minivan lost power, coasting backward at a slow rate of speed.

A jury could then have determined from this record that Torres fired a second volley of four shots directly at Jason as he lay on the steering wheel, having lost consciousness or suffered mortal injuries. When Torres stopped shooting, he had fired eleven (11) rounds at Jason, hitting him ten (10) times. The report of the Medical Examiner found that Jason died of "multiple gunshot wounds" (App. 33); the accident reconstructionist also determined that the nature of the minivan's tire tracks together with the glass patterns found on the path as it backed up demonstrated that "three shots were fired [at Jason] *after* there was no longer power in the minivan"(App. 33)(emphasis supplied).

In *Garner*, the Court held that "the use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable....A police officer may not seize an unarmed, nondangerous suspect by shooting him dead." 471 U.S. at 11. A reasonable jury, viewing the evidence in the light most favorable to petitioners, could have found that this is precisely what occurred here. The majority's unwarranted treatment of the facts and the law establishes a new rule, contrary to *Garner*, that a police officer may reasonably fire repeatedly upon an unarmed, wounded citizen even when the vehicle he was driving presented no threat of imminent harm to the police officers and where alternative courses of action were available to avoid this result. The majority's faulty reasoning justifiably invokes this Court's superintendency powers in order to reassert *Graham's* bedrock principles for assessing reasonableness in deadly force cases.

Finally, the law represented by *Garner*, *Graham* and its progeny were clearly established in 2005 when Torres shot and killed Jason. As early as 1996, the Ninth Circuit court of appeals, relying upon *Garner*, assumed without extended comment that "the law governing when an officer may use deadly force against an unarmed fleeing suspect was clearly established...." *Acosta v. San Francisco*, 83 F.3d 1143, 1146-1147(9th Cir. 1996)("shooting the driver of a slow-moving car" was not entitled to qualified immunity, especially when "a reasonable officer...would have recognized that he could avoid being injured by simply stepping to the side.").

2. By Deciding Disputed Fact Questions On Summary Judgment To Conclude That Respondent Was Entitled To Qualified Immunity For Shooting The Driver Eleven Times In Two Separate Volleys As He Sat In A Minivan, The Court of Appeals Has Overstepped Its Role As A Reviewing Court, Undermined Summary Judgment Procedure And Denied Petitioners The Jury Trial They Deserved.

Once Torres moved for summary judgment under Fed. R. Civ. P. 56 claiming the absence of a genuine issue of material fact for trial on the basis of his qualified immunity, the burden shifted to petitioners to adduce facts which legitimately put in dispute Torres' claim that he deserves this immunity. *Anderson v. Liberty Lobby*, 477 U.S. 242, 256-257(1986). *Celotex Corp. v. Catrett*, 477 U.S. 317, 324(1986). The Court has enunciated two core principles in reading the summary judgment record below in order to resolve Torres' motion: both the district judge and the court of appeals were bound: (1) to draw all reasonable

inferences from the materials *against* Torres and *in favor* petitioners; and (2) to resolve all credibility questions *in favor* petitioners because the courts' role is *not* to find facts but only to determine whether there are material fact issues for trial. *Scott v. Harris*, 550 U.S. at 378. *Beard v. Banks*, 548 U.S. 521, 529-530; 534(2006). *Reeves v. Sanderson Plumbing Products, Inc.*, 530 U.S. 133, 150-151(2000). *Anderson v. Liberty Lobby*, 477 U.S. at 249-255.

When a police officer such as Torres claims qualified immunity for his use of deadly force, the summary judgment protocol is further informed by the core principle that in order to determine whether his actions were objectively reasonable, it must be kept in mind that the victim of his deadly force is unavailable to testify and the police officer is the only surviving eyewitness; the "judge must ensure that the officer is not taking advantage of the fact that the witness most likely to contradict his story—the person shot dead—is unable to testify." *Scott v. Henrich*, 39 F.3rd 912, 915(9th Cir. 1992). Thus where versions of the operative facts differ, the motion judge consistent with *Scott*, *Beard*, *Reeves* and *Liberty Lobby* must be assiduous in drawing all permissible inferences in the victim's favor because his version of events will never fully be told.

In addition, while it is preferable to resolve the qualified immunity question at the earliest stage of litigation, "this preference does not give judges license to take inherently factual questions away from the jury." *Brosseau v. Haugen*, 543 U.S. 194, 206(2004)(*per curiam*)(Stevens, J., concurring) citing *Hunter v. Bryant*, 502 U.S. 224, 229(1991)(*per curiam*)(Scalia, J.,

concurring); *id.* at 233(Stevens, J., dissenting)("Whether a reasonable officer could have believed ha had probable cause is a question for the trier of fact, and summary judgment...in a § 1983 action based on the lack of probable cause is proper only if there is only one reasonable conclusion a jury could reach.").

The assessment of reasonableness must carefully examine all the evidence in the record, including medical reports, forensic analyses, eyewitness statements, various statements by the police officer and any other physical evidence in order to test the consistency of the police officer's possibly self-serving story with the known facts. See, e.g., *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756, 759;762-763(2nd Cir. 2003)(expert forensic evidence contradicts police officer's testimony about the proximate danger he allegedly faced); *Garvin v. Wheeler*, 304 F.3d 628, 631;634(7th Cir. 2002) (inconsistencies in officer's deposition testimony plus forensic evidence of body wounds leave reasonableness of officer's actions a jury question); *McCaslin v. Wilkins*, 183 F.3d 775, 777-779 (8th Cir. 1999)(eyewitness affidavits and forensic proof undermine officer's account about the threat posed by motorist at the end of a car chase and create a genuine issue of material fact for jury); *Hopkins v. Andaya*, 958 F.2d 881, 885-888(9th Cir. 1992)(medical evidence of officer's wounds could not justify his account of the altercation or his decision to use deadly force twice, *including his second volley of four shots at a wounded, unarmed victim*).

In contrast to the comprehensive analyses of the summary judgment materials by both the district court

and Judge Marshall in her dissent, the majority failed to adhere to these core principles. Instead of construing the facts in the light most favorable to petitioners, it immediately credited Torres' claim that when he began firing at Jason with his first volley, he believed that Officer Key "had been run over," ignoring petitioners' eyewitness account that Key had never been hit with the van, that he slipped on wet grass and quickly regained his feet and that he and Torres made eye contact and acknowledged each other before Torres started firing his first volley of seven shots.

It ignored eyewitness evidence that when Torres began firing his first volley, Jason's hands were plainly visible on the steering wheel at the 10 and 2 o'clock positions and that the minivan was *always* moving in a backward direction *away from* Officer Key who was standing in the front of the minivan, never endangering him. As eyewitness Davis observed, when Torres began shooting, Key had *already* reached his feet and was "out of the way of the car so he wouldn't get ran [sic] over" (App. 31-32;41). The majority's belief that no facts in the record contradicted Torres' self-serving claim that he believed Key had been run over is belied by petitioners' evidence adduced in the district court, referenced by Judge Settle in his Order and identified by Judge Marshall in her dissent (App. 19-22;31-32;41).

As for Torres' second volley, the majority ignored forensic evidence of the minivan's tire tracks and glass fragments found on its path as it backed up which demonstrated that Torres fired at least three shots at Jason *after* there was no longer power in the minivan, when Jason lay slumped on the steering wheel

either unconscious or already mortally wounded, presenting no threat to anyone. It also ignored Torres' own admission that he fired this second volley after the minivan had stopped or lost power. Instead, it chose another part of Torres' contradictory testimony to conclude that he shot the second volley of four shots because Jason had *not* stopped the minivan.

The majority even described a scenario which *never* happened: even after Torres fired his second volley, the minivan (with Jason presumably still driving even though already shot dead) continued to arc "dangerously" around Torres, "eventually" slowing down, an event which is flatly contradicted by Officer Schanaker who saw Jason's hands fall from the steering wheel after Torres' first volley, the minivan continuing to coast backward at a slow rate of speed and then, seconds later, Torres firing another four rounds directly at Jason as he lay across the steering wheel.

While reasonableness is "judged from the perspective of a reasonable officer on the scene," *Graham*, 490 U.S. at 396, this perspective cannot become on summary judgment a sledgehammer which automatically renders immaterial petitioners' countervailing forensic and eyewitness facts. Torres' account of crucial events must jibe with other known facts before they carry the ring of truth and render the issue one of law. His self-serving account—adopted wholesale by the majority----is incompatible with these other known facts. In this case, the question of whether a constitutional violation occurred "turns on which of two conflicting stories best captures what happened on the street." *Saucier v. Katz*, 533 U.S. 194, 216(2001)(Ginsburg, J., concurring), making summary

judgment inappropriate. See *Brosseau v. Haugen, supra.*

This distortion of the Rule 56 procedure by the majority invokes this Court's power of superintendency over the federal courts and the federal system in order to reassert the lower courts' proper role in deciding summary judgment motions. The Court should reaffirm the holdings of *Scott, Beard, Reeves* and *Anderson* which require courts to draw all reasonable inferences in favor of the party opposing the motion for summary judgment, especially in deadly force cases where qualified immunity is asserted, and to refrain from making credibility determinations in order to resolve material factual disputes because this is a function of a jury, not a judge. *Beard v. Banks*, 548 U.S. at 555 (Ginsburg, J., dissenting).

The majority's unfair summary judgment analysis also works a denial of petitioners' right to a jury trial on the merits of their claims. The seventh amendment to the federal constitution provides that in suits at common law, "the right of trial by jury shall be preserved...." As Justice Scalia observed in *Blakely v. Washington*, 542 U.S.296, 305-306(2004), the right to a jury trial in civil cases is not a procedural formality but rather a fundamental "reservation of power in our constitutional structure," assuring the people's ultimate control of the judiciary. *Id.* citing 2 *The Complete Anti-Federalist* 315, 320(H. Storing ed.1981). This guaranty of a jury trial in the Constitution and the common law traditions it entrenches "do not admit the contention that facts are better discovered by judicial inquisition than by adversarial testing before a jury."*Id.* at 313 citing 3 Blackstone, *Commentaries*, at 373-374; 379-381.

Indeed, "[i]nstitutionally speaking, appellate judges enjoy no comparative expertise" over district judges in ferreting out the existence or non-existence of triable issues of material fact—a task which district judges like Judges Marshall and Settle confront almost daily. *Johnson v. Jones*, 515 U.S. 304, 319-320(1995). The majority's egregious factfinding which sanitizes Torres' conduct at every turn drained this record of every disputed fact issue, improperly transforming an issue of fact into one of law and, in the process, subverting *Johnson's* holding by conferring appellate jurisdiction in the court of appeals over this interlocutory appeal where there was none in the first place.

CONCLUSION

For all of the reasons stated herein, the Court should grant a writ of certiorari to review and vacate the judgment of the court of appeals, remand the matter to the district court for further discovery and a trial on the merits of the petitioners' claims against respondent; or provide them with such other relief as is fair and just in the circumstances.

Respectfully submitted,

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No. 09-35098

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT WILKINSON, in his individual capacity and as Executor of the Estate of Jason Scott Wilkinson; ALISHA WHITE, an individual; ESTATE OF JASON SCOTT WILKINSON, Plaintiffs-Appellees,

v.

RICK TORRES, individually and as City of Vancouver Police Officer, Defendant-Appellant.

January 15, 2010, Argued and Submitted, Seattle, Washington
July 6, 2010, Filed

Appeal from the United States District Court for the Western District of Washington. DC NO. CV 08-5281 BHS. Benjamin H. Settle, District Judge, Presiding.

COUNSEL: Beau D. Harlan, Vancouver, Washington, for the plaintiffs-appellees.

Stewart A. Estes, Keating, Bucklin & McCormack, Seattle, Washington, for the defendant-appellant.

Before: A. Wallace Tashima and Richard C. Tallman, Circuit Judges, and Consuelo B. Marshall, District Judge. * Opinion by Judge Tashima; Dissent by Judge Marshall.

OPINION

TASHIMA, Circuit Judge:

On May 8, 2005, Defendant-Appellant Rick Torres ("Torres") shot and killed Jason Scott Wilkinson ("Wilkinson") as Wilkinson was driving a stolen minivan in a residential yard where the officers were on foot. Plaintiffs-Appellees Scott Wilkinson, Alisha Wilkinson, and the estate of Jason Scott Wilkinson (collectively, "Plaintiffs") brought an action against Torres and others, alleging that their constitutional rights under the Fourth and Fourteenth Amendments were violated by Torres' use of deadly force. Torres moved for summary judgment on the issue of qualified immunity, but the district court denied the motion, citing disputed issues of material fact. Torres appeals, arguing that he is entitled to qualified immunity because his use of force was reasonable as a matter of law. We agree and therefore reverse.

BACKGROUND

On May 8, 2005, at approximately 11:20 a.m., City of Vancouver Police Officer John Key ("Key") was on patrol when he saw a minivan parked near a known drug house. Key checked the license plate on his mobile data center (*i.e.*, an in-car computer) and confirmed over the radio that the vehicle was stolen. Key yelled at the driver to get his attention, but the driver, instead of responding, leaned down out of Key's sight. After half a minute to a minute, the driver sat up, started the car, and started driving away. Key pursued the minivan in his car.

While this was happening, Torres, another Vancouver Police Officer, was on duty nearby. Torres heard Key's request on the radio to check the plate. According to Torres, he "could tell by the tone of [Key's] voice that something was up." Torres joined the pursuit with his siren on and eventually took the lead in order to execute a Pursuit Immobilization Technique ("PIT") maneuver on the minivan.[1] The pursuit proceeded at a moderate speed -- five to ten miles over the speed limit. After the minivan entered a "T" intersection, Torres executed the PIT maneuver, causing the minivan to spin. The minivan kept going, however, and Torres executed a second PIT maneuver, causing the minivan to enter a yard on the northwest corner of the intersection.

After entering the yard on the eastern side, the minivan regained control and accelerated in a southwest direction back toward the road. At this point, Clark County Deputy Sheriff Scott Schanaker ("Schanaker"), who had arrived at the scene, positioned his car in the minivan's path to block the escape. The minivan swerved and hit a telephone pole next to Schanaker's car.

Key and Torres got out of their patrol cars and approached the minivan on foot. Torres yelled at the driver to show his hands. Key attempted to open the driver-side front door and fell on the ground about the same time as the minivan started moving in reverse.[2] The front of the minivan swung toward the driver side, and the rear of the minivan swung toward the passenger side. The wheels on the minivan were spinning and throwing up mud. After one to two seconds, according to Plaintiffs' witness, Key got up

and "walked[ ] or jumped out of the way . . . so he wouldn't get ran (sic) over."

Once he saw Key fall down, Torres yelled at the driver to stop. Torres believed that Key had been run over. The minivan continued to back up, and Torres began shooting through the passenger-side window. After a slight pause during which he assessed the situation, Torres continued firing at the driver of the minivan. The minivan continued to arc around Torres, but eventually straightened out and slowed down. Torres called in that shots had been fired. Evidence later showed that Torres had fired eleven rounds of a fifteen-round magazine. According to radio logs, the elapsed time between the final PIT maneuver and the radio call after the shots had been fired was nine seconds.

The driver of the minivan died of multiple gunshot wounds and was later identified as Wilkinson. Plaintiffs brought this 42 U.S.C. § 1983 action against Torres and others. The district court denied Torres' motion for summary judgment based on qualified immunity. Torres timely appeals.

JURISDICTION AND STANDARD OF REVIEW

Although an appellate court generally does not have jurisdiction over an interlocutory appeal from the denial of a motion for summary judgment, an order denying qualified immunity is immediately appealable. *Scott v. Harris*, 550 U.S. 372, 376 n.2, 127 S. Ct. 1769, 167 L. Ed. 2d 686 (2007). Our jurisdiction to review an interlocutory appeal of a denial of qualified immunity, however, is limited exclusively to questions of law. *Sanchez v. Canales*, 574 F.3d 1169, 1173 (9th Cir. 2009).

Where disputed issues of material fact exist, we must assume the version of facts presented by the plaintiff. *Id.*

We review a denial of qualified immunity de novo. *Porter v. Osborn*, 546 F.3d 1131, 1136 (9th Cir. 2008). In doing so, we must "view the facts and draw reasonable inferences 'in the light most favorable to the party opposing the [summary judgment] motion.'" *Scott*, 550 U.S. at 378 (alteration in original) (citations omitted). However, when the facts, as alleged by the non-moving party, are unsupported by the record such that no reasonable jury could believe them, we need not rely on those facts for purposes of ruling on the summary judgment motion. *Id.* at 380.

DISCUSSION

Plaintiffs claim that Torres violated Wilkinson's Fourth Amendment right to be free from excessive force and Scott Wilkinson and Alisha White's Fourteenth Amendment due process right to familial association. We analyze each claim in turn.

I. Fourth Amendment Claim

Apprehension by deadly force is a seizure subject to the Fourth Amendment's reasonableness requirement. *See Graham v. Connor*, 490 U.S. 386, 395, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). However, an officer using deadly force is entitled to qualified immunity, unless the law was clearly established that the use of force violated the Fourth Amendment. *See Brosseau v. Haugen*, 543 U.S. 194, 198, 125 S. Ct. 596, 160 L. Ed. 2d 583 (2004). The qualified immunity inquiry consists of

two parts: (1) "whether the facts that a plaintiff has alleged . . . or shown . . . make out a violation of a constitutional right," and (2) "whether the right at issue was 'clearly established' at the time of defendant's alleged misconduct." *Pearson v. Callahan*, 129 S. Ct. 808, 815-16, 172 L. Ed. 2d 565 (2009) (citation omitted).

Case law has clearly established that an officer may not use deadly force to apprehend a suspect where the suspect poses no immediate threat to the officer or others. *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). On the other hand, it is not constitutionally unreasonable to prevent escape using deadly force "[w]here the officer has probable cause to believe that the suspect poses a threat of serious physical harm, either to the officer or to others." *Id.*

In assessing reasonableness, the court should give "careful attention to the facts and circumstances of each particular case, including the severity of the crime at issue, whether the suspect poses an immediate threat to the safety of the officers or others, and whether he is actively resisting arrest or attempting to evade arrest by flight." *Graham*, 490 U.S. at 396. "The 'reasonableness' of a particular use of force must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight." *Id.* (citation omitted). In addition, "[t]he calculus of reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments -- in circumstances that are tense, uncertain, and rapidly evolving -- about the amount of force that is necessary in a particular situation." *Id.* at 396-97.

Whether the use of deadly force is reasonable is highly fact-specific, *see Scott*, 550 U.S. at 383 ("Although respondent's attempt to craft an easy-to-apply legal test in the Fourth Amendment context is admirable, in the end we must still slosh our way through the factbound morass of 'reasonableness.'"), but the inquiry is an objective one, *Graham*, 490 U.S. at 397 ("[T]he question is whether the officers' actions are 'objectively reasonable' in light of the facts and circumstances confronting them . . . ." (citation omitted)). A reasonable use of deadly force encompasses a range of conduct, and the availability of a less-intrusive alternative will not render conduct unreasonable. *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 1994).

Here, Torres did not violate a constitutional right. Even construing the facts in the light most favorable to Plaintiffs, a reasonable officer in Torres' position had probable cause to believe that Wilkinson posed an immediate threat to the safety of Key and himself.[3] When he fired the shots, Torres was standing in a slippery yard with a minivan accelerating around him. The driver of the minivan had failed to yield to police sirens as well as to direct commands to put his hands up and to stop the vehicle. *Cf. Brosseau*, 543 U.S. at 200 (finding that "shoot[ing] a disturbed felon, set on avoiding capture through vehicular flight, when persons in the immediate area are at risk from that flight" was not a clearly established Fourth Amendment violation). The minivan was accelerating, its tires were spinning, mud was flying up, and a fellow officer was nearby either lying fallen on the ground or standing but disoriented. The situation had quickly turned from one involving a crashed vehicle to one in which the driver of a moving vehicle, ignoring police

commands, attempted to accelerate within close quarters of two officers on foot. In this "tense, uncertain, and rapidly evolving" situation, a reasonable officer had probable cause to believe that the threat to safety justified the use of deadly force.

Plaintiffs argue that the declaration of Anthony Davis, a bystander witness, creates triable issues of fact as to whether Key was in harm's way during the shooting, and whether Key and Torres were in each other's line of sight moments before the shooting. This argument cannot support the denial of summary judgment. Although Davis stated that Key immediately jumped back to his feet after falling, he also stated that he was worried that Key would get run over, because Key was in shock after getting up. More importantly, we must view the facts from Torres' perspective at the time he decided to fire. Even if Key was in fact out of harm's way by the time of the shooting and Key and Torres were in each other's line of sight before the shooting, the critical inquiry is what Torres perceived. Torres' testimony that he saw Key fall, thought Key had been run over, and was afraid that the van would arc back around toward Key, is uncontradicted by any evidence in the record. To the contrary, the evidence shows that the van was still moving in the midst of the officers who were trying to stop it when the fatal shots were fired.

Furthermore, Plaintiffs' sanitized version of the incident cannot control on summary judgment when the record as a whole does not support that version. Plaintiffs state: "Key stood in front of the minivan as it backed slowly away . . . . Torres then walked to the front passenger window . . . and fire (sic) his weapon into the minivan at the driver . . . ." While perhaps true

as far as it goes, this version omits the urgency of the situation. After all, the record is uncontroverted that this entire episode occurred in less than nine seconds. *Cf. Scott*, 550 U.S. at 378-79 ("Indeed, reading the lower court's opinion, one gets the impression that respondent, rather than fleeing from police, was attempting to pass his driving test . . . ."). Torres had just run up to the side of the minivan and put his hand on the window when the vehicle started moving again after having crashed into a telephone pole. He could hear the engine revving and the wheels spinning. Although the vehicle was moving at a slow rate of speed because of the slippage, it could have gained traction at any time, resulting in a sudden acceleration in speed. Torres was not observing the minivan from a distance as Davis was, but was standing in the partially enclosed yard with a driver desperate to escape.

Plaintiffs argue that this court should follow the Eighth Circuit's decision in *McCaslin v. Wilkins*, 183 F.3d 775 (8th Cir. 1999), and the Second Circuit's decision in *Cowan ex rel. Estate of Cooper v. Breen*, 352 F.3d 756 (2d Cir. 2003), and find summary judgment inappropriate. These cases, however, are distinguishable.

In *McCaslin*, the decedent's truck had slid over an embankment into a ditch during a high-speed vehicular pursuit. *McCaslin*, 183 F.3d at 777. Although police stated that the truck started driving back up the embankment toward them before they fired any shots, two witnesses stated that the gunshots began almost immediately after the truck left the road, and one of the witnesses stated that the tire tracks did not indicate that the truck had ever started back up the

embankment. *Id.* The Eighth Circuit, finding that the disputed facts were material, affirmed the denial of summary judgment for the defendant. *Id.* at 779.

In *Cowan*, the defendant fired twice at the driver of an approaching car from the side of a highway, claiming that he feared he was in danger of being run over. *Cowan*, 352 F.3d at 758-59. The plaintiff presented evidence, however, showing that the car was traveling slowly and that the officer was not in the vehicle's path but off to the side. *Id.* at 759. Furthermore, the officer did not state that the second shot was fired because of any danger to himself, but rather because he was trained to fire twice. *Id.* at 763.

Here, unlike in *McCaslin* and *Cowan*, there are no material disputed facts. Torres, the other witnesses, and even Plaintiffs' experts agree that the minivan was backing up in an arc when Torres fired the shots. Because the van could have arced around to run over Key or Torres, or stopped and pulled forward with the same effect, Torres' fear for the safety of himself and others was reasonable.

To the extent that *Cowan* requires an officer to reevaluate whether a deadly threat has been eliminated after each shot, we disagree that it should be applied in the circumstances of this case. Such a requirement places additional risk on the officer not required by the Constitution. Torres did not shoot mindlessly, but responded to the situation by ceasing fire after he perceived that the van had lost power and that the threat had been eliminated. *Cf. Elliott v. Leavitt*, 99 F.3d 640, 643 (4th Cir. 1996) (concluding that the firing of multiple shots "does not suggest the officers shot

mindlessly as much as it indicates that they sought to ensure the elimination of a deadly threat"). Because we conclude as a matter of law that deadly force was authorized to protect a fellow officer from harm, it makes no difference in this case whether Torres fired seven rounds or eleven.[4]

The district court based its denial of summary judgment partially on the following testimony by Torres:

> I thought what happened was I fired four rounds, and [Wilkinson] *kept going*, and he was -- and then, I fired . . . made a quick assessment, *and he had stopped*, and I fired . . . I fired two more. That's what I think I did.

(Emphasis added.) The single phrase "he had stopped," implying that Wilkinson had stopped before Torres fired the second volley, cannot alone support summary judgment where Torres repeatedly testified -- in that same sentence, multiple times during the same interview, and in a separate interview -- that Wilkinson did *not* stop until after Torres began firing his second volley. *See Scott*, 550 U.S. at 380 ("Where the record *taken as a whole* could not lead a rational trier of fact to find for the nonmoving party, there is no genuine issue for trial." (quoting *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 587, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986)) (internal quotation marks omitted) (emphasis added)). The quoted sentence from Torres' deposition is ambiguous because a literal reading of the sentence does not make sense -- Torres states that Wilkinson "kept going" just before he says Wilkinson "had stopped." Therefore, in this context, the

phrase "had stopped" is an insufficient basis for the denial of summary judgment. *Cf. Hart v. Parks*, 450 F.3d 1059, 1068 (9th Cir. 2006) (finding that a single, arguably ambiguous statement did not raise a triable issue of fact).

Plaintiffs next argue that Torres fired at least three rounds into Wilkinson after power was no longer being supplied to the minivan and any safety risk had been eliminated. This interpretation of the evidence also cannot support the denial of summary judgment because, even if it were true, there is no evidence that Torres had immediately perceived the deceleration of the minivan. To the contrary, it suggests that Wilkinson had not stopped before Torres began firing the second volley. Torres testified that he wondered if he had missed Wilkinson, because Wilkinson did not appear to react after the first volley. The entire time that elapsed between the time of the PIT maneuver and the radio call after the last shot was fired was nine seconds. The shots themselves happened so fast that Davis does not appear to have distinguished the two volleys. Torres stopped firing after he perceived that Wilkinson had gone limp and the van had straightened out. As the Fourth Circuit noted in *Elliott*, "the Fourth Amendment does not require omniscience," and absolute certainty of harm need not precede an act of self-protection. *Elliott*, 99 F.3d at 644.

A reasonable police officer confronting this scene could reasonably believe that the minivan posed a deadly threat to Key and himself. Thus, Torres' use of deadly force on Wilkinson was constitutional.

Because we conclude that Torres did not violate a constitutional right, we need not reach the question of whether that right was clearly established. *See Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001), *overruled in part by Pearson v. Callahan*, 129 S. Ct. 808, 172 L. Ed. 2d 565.

II. Fourteenth Amendment Claim

This circuit has recognized that parents have a Fourteenth Amendment liberty interest in the companionship and society of their children. *Curnow ex rel. Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). Official conduct that "shocks the conscience" in depriving parents of that interest is cognizable as a violation of due process. *Porter*, 546 F.3d at 1137. In determining whether excessive force shocks the conscience, the court must first ask "whether the circumstances are such that actual deliberation [by the officer] is practical." *Id.* at 1137 (quoting *Moreland v. Las Vegas Metro. Police Dep't*, 159 F.3d 365, 372 (9th Cir. 1998) (internal quotation marks omitted)). Where actual deliberation is practical, then an officer's "deliberate indifference" may suffice to shock the conscience. *Id.* On the other hand, where a law enforcement officer makes a snap judgment because of an escalating situation, his conduct may only be found to shock the conscience if he acts with a purpose to harm unrelated to legitimate law enforcement objectives. *Id.* at 1140. For example, a purpose to harm might be found where an officer uses force to bully a suspect or "get even." *Id.*

In *Porter*, this court found that actual deliberation was not practical where a five-minute altercation between

the officers and victim evolved quickly and forced the officers to make "repeated split-second decisions." *Id.* at 1139. The court noted that "deliberation" should not be interpreted in the narrow, technical sense, reasoning that the Supreme Court had rejected the deliberate indifference standard even in cases where an officer giving chase could have deliberated while pursuing the suspect. *Id.* at 1139-40. Instead, the heightened purpose-to-harm standard applies where a suspect's evasive actions force the officers to act quickly. *Id.* at 1140.

Here, application of the purpose-to-harm standard is clearly appropriate. Within a matter of seconds, the situation evolved from a car chase to a situation involving an accelerating vehicle in dangerously close proximity to officers on foot. Ultimately, Wilkinson's act of accelerating in reverse despite repeated warnings to stop forced Torres to make a split-second decision. As opposed to the five minutes which elapsed in *Porter*, the entire sequence of events here from the PIT maneuver to the final shot occurred in less than nine seconds.

Applying this standard, no evidence shows that Torres had a purpose to harm Wilkinson apart from legitimate law enforcement objectives. Plaintiffs argue that Torres's intent to harm Wilkinson was apparent because as the minivan slowly backed up from the telephone pole, Torres walked up to Wilkinson and "executed" him. However, no intent to harm separate from a legitimate law enforcement objective is evidenced by the mere fact that Torres shot Wilkinson, especially in the escalating situation with Key having fallen down, the engine revving, and the tires throwing

up mud. No one could predict how quickly the minivan would gain traction. Furthermore, because Torres was in a rapidly evolving situation requiring him to make "split-second judgments," we need not scrutinize as closely as the district court did Torres' decision about how best to minimize the risk to his own safety and the safety of others. *See Porter*, 546 F.3d at 1139. In sum, Plaintiffs have not established a substantive due process claim.

CONCLUSION

For the reasons stated above, we reverse the district court's interlocutory order denying Torres' motion for summary judgment and remand to the district court with instructions to grant the motion for summary judgment based on qualified immunity.

REVERSED and REMANDED.

Footnotes

*The Honorable Consuelo B. Marshall, United States District Judge, Central District of California, sitting by designation.

1A PIT maneuver is a law enforcement procedure whereby a police officer bumps the rear quarter panel of the suspect's vehicle with the front quarter panel of the officer's vehicle, sending the suspect vehicle into a spin.

2The parties dispute whether Key slipped on the grass or was knocked over by the minivan. This dispute is immaterial to our determination of this case.

3Torres also argues that Wilkinson posed a risk to the public at large. Because the threat to the safety of Key and Torres was enough to justify the use of deadly force, we need not reach this argument.

4The dissent asserts that two seconds intervened between Torres' first and second volley of shots. Dissent at 9561. We do not decide whether a two-second pause between rapid-fire volleys may be enough time for an officer to reevaluate the need for deadly force. On the record here, no evidence supports a two-second pause between the volleys. Torres testified that the second volley immediately followed the first, and Davis himself did not distinguish one volley from another. Although the radio log shows a two-second interval between a call of "shots fired" and "shots code 3," there is no evidence that these two log entries represent the two volleys of shots. To the contrary, a review of the audio log suggests that at least one "shots code 3" call was made by a speaker other than Key.

DISSENT

MARSHALL, District Court Judge, dissenting:

I respectfully dissent on the ground that the majority today decides as a matter of law what I believe is a question of fact properly reserved for the jury. The reasonableness of an officer's use of excessive force pursuant to the Fourth Amendment is a fact-intensive inquiry for the jury, which if raised on summary judgment, must be evaluated in the light most favorable to the victim. *See gen. Jeffers v. Gomez*, 267 F.3d 895, 905-06 (9th Cir. 2001) (collecting cases).

Similarly, where the same disputed facts also give rise to both a Fourth Amendment claim and a Fourteenth Amendment "purpose to harm" claim, material and triable issues of fact exist as to both. *See Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008).

JURISDICTION

I find we lack jurisdiction to review Torres's appeal that he is entitled to qualified immunity because there are material issues of fact in dispute. *See Johnson v. Jones*, 515 U.S. 304, 317-20, 115 S. Ct. 2151, 132 L. Ed. 2d 238 (1995); *Mitchell v. Forsyth*, 472 U.S. 511, 530, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985) (holding that a "district court's denial of a claim of qualified immunity" is immediately appealable only to "the extent it turns on an issue of law"); *see also Jeffers*, 267 F.3d at 905-06 (concluding that jurisdiction extends only to whether, based on the undisputed facts, the officer is entitled to immunity as a matter of law); *Collins v. Jordan*, 110 F.3d 1363, 1370 (9th Cir. 1997). Torres asks us to: (1) accept his version of the events on the morning of May 8, 2005; and then (2) enter judgment in his favor as a matter of law. *See id.; Armendariz v. Penman*, 75 F.3d 1311, 1317 (9th Cir. 1996) (en banc); *Cowan v. Breen*, 352 F.3d 756, 763 (2d Cir. 2003) ("Although [the officer] purports to rely on the undisputed evidence . . . his brief . . . is replete with his own version of the . . . to the extent [his version] is disputed by [the victim's,] [his] forms no proper basis for this appeal.") (internal citations omitted).

A reviewing court may not resolve questions of fact in order to reach the legal questions. *See id.* at 762 ("in order to accept [the officer]'s argument that, as a

matter of law, his actions were objectively reasonable, one would have to accept, as a matter of *fact*, that [the victim posed an immediate threat].") (emphasis in original). A "defendant, entitled to invoke a qualified immunity defense, may not appeal a district court's summary judgment order insofar as that order determines whether or not the pretrial record sets forth a genuine issue of fact." *Johnson*, 515 U.S. at 319-20. Accordingly, we cannot rely on Torres's version of the events. *See Cowan*, 352 F.3d at 762; *see also McCaslin v. Wilkins*, 183 F.3d 775, 779 (8th Cir. 1999) (reasoning that a genuine issue of material fact with regard to the threat the victim posed prevented a finding that the officer's conduct was reasonable as a matter of law).

Based on the foregoing, I would dismiss the appeal for lack of jurisdiction.

QUALIFIED IMMUNITY ON FOURTH AMENDMENT CLAIM

If I were to accept jurisdiction of this case, I would nonetheless affirm the district court's denial of summary judgment.

The use of *deadly* force is constitutional only in the most limited of circumstances. *See Tennessee v. Garner*, 471 U.S. 1, 9-11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). Because the reasonableness of the use of deadly force is an extremely fact intensive inquiry, "the propriety of a particular use of force is generally an issue for the jury." *Chew v. Gates*, 27 F.3d 1432, 1440 (9th Cir. 1995); *see also Reed v. Hoy*, 909 F.2d 324, 329-30 (9th Cir.

1989) *cert. denied*, 501 U.S. 1250, 111 S. Ct. 2887, 115 L. Ed. 2d 1053 (1991).

Reasonableness is "judged from the perspective of a reasonable officer on the scene". *Graham v. Connor*, 490 U.S. 386, 396, 109 S. Ct. 1865, 104 L. Ed. 2d 443 (1989). The inquiry is objective, rather than subjective. An officer's own motivations and intentions are irrelevant to the Fourth Amendment analysis, *see id.* at 397, because deadly force cases "pose a particularly difficult problem" as "the officer defendant is often the only surviving eyewitness." *Scott v. Henrich*, 39 F.3d 912, 915 (9th Cir. 2004). Thus, courts should consider "circumstantial evidence that, if believed, would tend to discredit the police officer's story". *Id.*

The case law requires us to consider whether Torres's use of deadly force was reasonable in light of the facts most favorable to the Wilkinsons, *see Jeffers*, 267 F.3d at 905-06, which includes testimony from non-officer eye-witnesses. *See id.* (courts must protect against chance that the officer will "tak[e] advantage of fact that the witness most likely to contradict [the officer's] story -- the victim -- is unable to testify."); *see also Cowan*, 352 F.3d at 762 ("[W]here the versions of the facts differ, we must consider [the victim]'s version and make all permissible inferences in [his] favor."). Here, the only non-officer eye-witness, and the one most likely to contradict Torres's story, is Anthony Davis. *See McCaslin*, 183 F.3d at 778 (affidavits from non-party eyewitnesses can create material issues of fact).

Statements made by eyewitness Davis who watched the van drive into the sideyard, ER at 307, suggest both that the van never hit Key, ER at 313-316, 320,

and that Wilkinson put the van into reverse to *prevent* hitting Key. ER at 314 ("He was trying to turn around and go the other direction, because he didn't want to run over the cop"), 316 ("He wasn't, like, being erratic . . . He was looking for a direction to go . . . Like, 'Whoa, where do I go?'").

Davis consistently stated -- both to the police in an interview that took place just after the shooting and in his affidavit -- that he saw Key:

> [S]lip[ ] on the wet grass, f[a]ll on his back side, was on the ground for only a second or two, then jump[ ] back on his feet, walk[ ] toward the front of the [ ]van . . . [and] st[and] in front of the [ ]van as it backed slowly away from [him].

ER at 307. Davis reiterated on at least three different occasions during his interview with police that: (1) he saw Key walk to the front of the vehicle; and (2) that Key was standing at the front of the vehicle when it started to move slowly backwards. ER at 314, 320, 324.

Then, according to Davis, Torres and Key "made eye contact and appeared to acknowledge each other" and Torres began firing. ER at 308. Davis states that when Torres began firing, the "van was moving in almost the opposite direction from where the officer first stood . . . nowhere near the [ ]van's path of travel and not in harm['s] way." ER at 308. Davis's statement that the "van was traveling at such a slow rate of speed that the officer was able to walk in pace with [it] as he repeatedly fired at the driver", is corroborated by the undisputed forensic evidence that the vehicle moved backwards at about ten miles per hour. *Id.*

Davis's declaration and statement to the police create a material issue of fact as to whether Torres had probable cause to believe Wilkinson posed a threat of serious physical harm to officer Key. *See McCaslin*, 183 F.3d at 778. "Looking at *only* [Davis]'s version of the events," no reasonable officer who could see his colleague standing in front of the van would have "believed that at th[at] crucial moment use of deadly force was necessary." *Cowan*, 352 F.3d at 763 (emphasis in original). Thus, as in *McCaslin*, the "[h]ow and what transpired after [the vehicle hit the pole] is the essence of this case and there remains a genuine issue [of] material fact as to what happened . . . and how the officers responded". 183 F.3d at 779 (internal citation omitted). Whether Torres and Key acknowledged each other and whether Key stood in front of the van before the shooting are material questions that cannot be resolved on summary judgment.

Reasonableness is determined from the moment the allegedly deadly shot is fired. *Id.* at 763 (considering whether second, deadly round, was reasonable); *Hopkins v. Andaya*, 958 F.2d 881, 887 (9th Cir. 1992). Accordingly, whether Torres's second round was justified is also a question for the jury.

Davis told police that immediately after the first volley of shots, he saw Wilkinson slump into his seat and Wilkinson's hands drop from the steering wheel to his side. *Id.* at 316. Torres shot again.

Here, the evidence suggests that two seconds intervened between Torres's first and second volley of shots. First, Torres stated that he made a "quick assessment [after he fired the first shot], and

[Wilkinson] had stopped, and . . . I fired two more". ER at 213. Second, the transcript of the audio "radio traffic" indicates that Officer Key transmitted a call of "Shots Fired" at 11:24:41 a.m. ER at 169. Another call of "Shots. Code 3" was transmitted at 11:24:43 a.m. Based on this transcript and Torres's own statement, a jury could infer that two seconds elapsed before Torres fired again.

Two seconds is sufficient time from which a jury could find that a reasonable officer on the scene could have glanced over at the vehicle, seen that Wilkinson had been shot and that his hands were no longer on the wheel, and forgone the use of deadly force. Thus, based on the record before it, the district court was correct in holding that there were material issues of fact with respect to whether the second round of deadly shots was reasonable.

Furthermore, although the reasonableness analysis discourages courts from second-guessing officers who must make split-second decisions, *Graham*, 490 U.S. at 396-97, Torres's statement that he quickly assessed the scene after he fired the first shot "and [Wilkinson] had stopped, and I fired [again]", ER at 213, creates a question of fact as to whether Wilkinson had stopped the vehicle before Torres fired the second time.

Thus, I conclude that while "factual conflicts concerning the sequence of events and the true nature of the threat confronting [Officers Key and Torres] might be resolved in [Torres]'s favor at trial, it is neither our job nor the job of the district court to resolve these conflicts". *Andaya*, 958 F.2d at 888. The issue of reasonableness presents material questions of fact

which must be resolved by the jury. *Gates*, 27 F.3d at 1443.

QUALIFIED IMMUNITY ON FOURTEENTH AMENDMENT CLAIM

Next, I agree with the district court that the disputed facts preclude summary judgment in favor of Torres on the Wilkinson's Fourteenth Amendment claim.

Where "actual deliberation" by a police officer prior to using force is impractical, a "purpose of harm" standard applies to due process familial association claims. *Porter*, 546 F.3d at 1131. "View[ed] in the light most favorable [to the parents asserting the claims], [the facts] must demonstrate that [the officer] acted with a purpose to harm [the child] that was unrelated to legitimate law enforcement objectives." *Id.*

Although I agree with the majority that the purpose to harm standard applies, I conclude that the disputed facts, including Anthony Davis's portrayal of the events, prevent us from deciding that Torres did not intend to harm Wilkinson as a matter of law. Whether Torres's conduct "shocks the conscience", *id.* at 1136, is for the jury to decide.

CASE NO. C08-5281BHS

UNITED STATES DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON

SCOTT WILKINSON, et al.,
Plaintiffs,

v.

RICK TORRES, et al., Defendants.

January 23, 2009, Decided
January 23, 2009, Filed

BENJAMIN H. SETTLE, United States District Judge.

ORDER DENYING OFFICER TORRES' MOTION FOR SUMMARY JUDGMENT AND GRANTING OFFICER KEY'S MOTION FOR SUMMARY JUDGMENT

This matter comes before the Court on Defendant Torres' Motion for Summary Judgment (Dkt. 25) and Defendant Key's Motion for Summary Judgment (Dkt. 28). The Court has considered the pleadings filed in support of and in opposition to the motions and the remainder of the file and hereby denies Torres' motion without prejudice and grants Key's motion for the reasons stated herein.

I. PROCEDURAL BACKGROUND

On May 2, 2008, Plaintiffs Scott Wilkinson, Alisha

White, and the Estate of Jason Scott Wilkinson filed a complaint against Defendants Rick Torres, John Key, Brian Martinek, the City of Vancouver, and John and Jane Does 1-20. Dkt. 1. At all times material to the complaint, Defendants Rick Torres and John Key were police officers for the City of Vancouver. *Id.* ¶ 2.3.

Plaintiffs allege the following claims against Defendant Torres:

> Defendant Torres' actions violated decedent's right to be free from summary execution and punishment and deprivation of life and liberty without due process of law under the Fifth and Fourteenth Amendments to the United States Constitution, to be free from unreasonable search and seizure under the Fourth and Fourteenth Amendments and to feely [sic] associate with family and friends under the First and Fourteenth Amendments.

Id., ¶ 6.7.

Plaintiffs allege the following claim against Defendant Key:

> KEY was present when TORRES used the unreasonable, excessive, and deadly force, KEY knew or should have known TORRES was using unreasonable, excessive, and deadly force, and had the ability to intercede and prevent the continued use of said force; however, KEY stood by, neglected to make any effort to stop or intercede in the unconstitutional force, and

explicitly and/or tacitly approved of TORRES' use of deadly force.

Id., ¶ 7.2.

On November 7, 2008, Defendant Torres filed a Motion for Partial Summary Judgment. Dkt. 25. On December 2, 2008, Plaintiffs responded and included a motion to strike Defendant's references to Jason Wilkinson's Death Investigation Toxicology Report and to his criminal history. Dkt. 43. On December 5, 2008, Defendant Torres replied and included a motion to strike material Plaintiffs submitted in support of their response. Dkt. 47.

On November 7, 2008, Defendant Key filed a Motion for Summary Judgment. Dkt 28. On December 15, 2008, Plaintiffs responded and included a motion to strike the Declaration of Colleen Lines (Dkt. 34). Dkt. 49. On December 19, 2008, Defendant Key replied. Dkt. 51.

II. FACTUAL BACKGROUND

On May 8, 2005, Vancouver Police Officer John Key identified a stolen minivan with an unidentified driver inside the vehicle. Dkt. 30, Declaration of John Key ("Key Decl."), Exh. A, Interview of John Key ("Key Interview") at 4-5. After Officer Key yelled at the driver, the driver started the van and drove away from the scene. *Id.* at 5-6. Officer Key informed his dispatcher that the minivan "took off" and initiated a pursuit of the vehicle. *Id.* at 6.

Officer Rick Torres heard Officer Key's communications over the radio and became concerned

about the situation. Dkt. 36, Declaration of Rick Torres ("Torres Decl."), Exh. A, Interview of Rick Torres ("Torres Interview") at 5-6. At the time Officer Key radioed that the stolen van had driven away, Officer Torres claims that he was approximately six blocks away from Officer Key's location. *Id.* at 6-8. After Officer Key radioed the direction of the pursuit, Officer Torres waited at an intersection to intercept Officer Key and the van. *Id.* Officer Torres saw both vehicles approaching at a speed that wasn't over the speed limit. *Id.* He had his lights on and saw that Officer Key also had his lights on behind the van. *Id.* Both the van and Officer Key passed Officer Torres and Officer Torres joined the pursuit. *Id.* at 8-9.

It is undisputed that Officers Key and Torres followed the van for approximately three minutes over a distance of approximately two miles. Officer Torres claims that the pursuit proceeded at speeds of "maybe 10 miles over" the speed limit. *Id.* at 11. Officer Torres also claims that Officer Key encouraged him to perform a Pursuit Immobilization Technique ("PIT") on the van when he had the opportunity. *Id.* Defendant Torres states that a PIT is a recently developed law enforcement procedure where an "police officer places his vehicle parallel and a bit behind the suspect vehicle, and bumps the rear quarter panel with the front quarter panel of his vehicle sending the suspect vehicle into a spin." Dkt. 25 at 4.

As the van and Officer Torres approached the intersection of NE 49th St. and NE 40th Ave., Officer Torres decided that the intersection would be the "best spot to take him." Torres Interview at 12. When Officer Torres hit the van, the van spun 90 degrees. *Id.* at 13-

14. Officer Torres claims that the van attempted to "take off again" so he hit the van again. *Id.* at 14. After the second hit, the van spun off the road into a side yard. *Id.* at 15. As the van continued driving through the yard, Officer Torres stopped and exited his vehicle. *Id.* at 15-16. He claims that he saw the van attempt to maneuver through numerous trees in the yard and eventually hit a telephone pole. *Id.* at 16. Thomas Fries, a Traffic Accident Reconstructionist obtained by Plaintiffs, claims that the van "entered the yard, at an assumed speed of 10-12 mph, leaving tire marks for about 75 feet." Dkt. 46, Declaration of Thomas Fries ("Fries Decl."), ¶ 2(b). Mr. Fries also concludes that the van "impacted the telephone pole at 12-15 mph." *Id.* ¶ 2(c).

Clark County Deputy Sheriff Scott Shanaker was on patrol that day in the area of the pursuit. Dkt. 27, Declaration of Scott Shanaker, Exh. A, Interview of Scott Shanaker ("Shanaker Interview"), at 1-2. Deputy Shanaker heard the pursuit over the radio and proceeded to drive toward the pursuit. *Id.* He eventually reached the vehicles and saw Officer Torres' PIT maneuver from a distance. *Id.* at 3. He briefly lost sight of the van, but then he saw it drive around the house and through the yard. *Id.* He positioned his car to block the van's exit from the yard and, when the van compensated to avoid him, it ran into the telephone pole. *Id.* Deputy Shanaker positioned his car almost head-on with the van on the opposite side of the pole. *Id.* Deputy Shanaker observed Officer Key running toward the driver's door of the van and Officer Torres running in from behind the van. *Id.*

Anthony Davis was also at the intersection when

Officer Torres performed the PIT on the van. Dkt. 44, Declaration of Anthony Davis ("Davis Decl."), Exh. A, Interview of Anthony Davis ("Davis Interview") at 2. Mr. Davis claims that he saw the police lights, pulled over to the curb, and observed the remainder of the pursuit. *Id.* After the van entered the yard, Mr. Davis claims that "the cops blocked" the van in the yard, there was "no route of escape," and two officers ran toward the van, one with his gun drawn. *Id.* at 3.

It is unclear whether the driver of the van was knocked unconscious when the van collided with the telephone pole. Deputy Shanaker claims that, from "the length [of] the hood of [his] car away," it looked like the driver of the van got "knocked out." Shanaker Interview at 3. Officer Key thought that the pursuit was over and "the car was stopped," so when he reached the van, he grabbed the driver's side door handle and tried to open the door. Key Interview at 12-13. At about the same time as Officer Key grabbed the door, the driver put the van in reverse. *Id.* at 13; Shanaker Interview at 4.

Both Officer Key and Deputy Shanaker remember hearing the van's engine rev as it began to move backward away from the pole. The grass was wet and muddy that morning. Key Interview at 19. As a result, the van threw mud forward as the tires spun in reverse. Deputy Shanaker claims that the hood and windshield of his car were sprayed with mud and grass when the van started to spin its front wheels in the yard. Shanaker Interview at 4.

The next significant event was Officer Key falling to the ground. Mr. Davis claims that Officer Key "slipped on the wet grass." Davis Interview at 5. Officer Key

claims that he was knocked to the ground by the van when it began to back away from the telephone pole. Key Interview at 13. It is undisputed that the driver accelerated backwards in a counterclockwise arc. The steering wheel was turned to the right so that the front end of the vehicle swung in the direction of the driver's side while the rear of the vehicle swung in the direction passenger side. *See* Fries Decl., Exh 10 (aerial sketch of the path of the van). At this time, Officer Torres claims that he was at the passenger side, middle window of the van with his gun drawn and yelling "show me your hands." Torres Interview at 17. Officer Torres had his left hand on the van and he could feel it moving away from him as the engine revved. *Id.* He could see through the windows of the van that Officer Key went down. *Id.*

Officer Torres claims that his immediate thought was that the front wheels of the van were going to run over Officer Key. He stated that "the front end [of the van] is moving away from me, towards right were [Officer Key] went down." Torres Interview at 18. Officer Torres remembers "thinking [that] the wheels are on top of [Officer Key], spinning. And [he yelled] at [the driver] to stop, and [the driver] just kept going." *Id.* As the van continued arcing backward, Officer Torres saw Officer Key roll out onto the street "curled up, like, in a fetal position." *Id.* at 19. He remembers hearing Officer Key yell and "thought that he was dead." *Id.*

Concerned for the safety of both himself and Officer Key, Officer Torres began to fire bullets at the driver. *Id.* at 23. He claims that, "at some point, [he] shot . . . [he] fired at [the driver] to stop him." *Id.* at 18. Officer Torres fired two volleys of bullets. *Id.* at 24. He initially

remembered firing four bullets in the first volley, *id.* at 21; it was later determined that he fired seven rounds, Dkt. 25 at 10. He initially remembered firing two bullets in the second volley, Torres Interview at 18; it was later determined that he fired four rounds, Dkt. 25 at 11. There is a dispute as to the effect of the initial volley of bullets.

Officer Torres seems to contradict himself as to why he shot a second volley of bullets. At one point, he describes the situation as follows:

> I thought what happened was I fired four rounds, and he kept going, and he was -- and then, I fired . . . made a quick assessment, and he had stopped and I fired . . . I fired two more. That's what I think happened.

Torres Interview at 18. Later in the same interview, Officer Torres describes the situation as follows:

> I remember it was kind of like, you know, I'm shooting . . . I was shooting like this and I came down and he was still looking at me like nothing had happened. And so, then I went back up and I think I fired two more rounds.

Id. at 21. The former description can reasonably be read to state that the driver "had stopped and [Officer Torres] fired . . . [he] fired two more" bullets, whereas the latter description states that the initial volley of bullets had no affect on the driver of the van.

Mr. Davis claims that Officer Torres began to fire before Officer Key fell to the ground. Davis Interview

at 7. He states that one "officer walked right up to the passenger window and started firing." *Id.* at 4. Mr. Davis also claims that Officer Key fell to the ground because he slipped on the grass, which contradicts the story that the van knocked Officer Key to the ground. *Id.* at 5. Mr. Davis asserts that, after falling, Officer Key "jumped back up" and "jumped out of the way of the car so he wouldn't get ran [sic] over." *Id.* at 3.

Deputy Shanaker claims that the driver was knocked out and came to at the same time that Officer Key reached the driver's side door. Shanaker Interview at 4. He remembers seeing the driver put the van in gear and hearing the engine rev. *Id.* As the van began to move backwards, Deputy Shanaker decided that he should move his car in attempt to block any exit the van may have had from the yard. *Id.* at 7. He "turned around for just a second to make sure [he] was clear in back, because [he] was going to have to back [up] and maneuver" his car to block the van. *Id.* at 4. When he looked back toward the van, he saw Officer Torres with his gun "drawn out" and "he just starts shooting." *Id.* Deputy Shanaker did not see Officer Key. *Id.* Deputy Shanaker claims that Officer Torres was "dumping rounds" as the van was "turning in a big arc backwards." *Id.* at 4-5. After "three to six rounds," Deputy Shanaker could see that the driver was "still animated at that moment . . . [he was] cognizant of what he's doing, and then, it's just like he's not." *Id.* at 4. Then, he saw that the van had "died down in speed" and that the driver was no longer in control of it. *Id.* at 5.

Deputy Shanaker exited his vehicle, approached the driver's side of the van, reached through the driver's side window, and put the vehicle in park. *Id.* at 6. He

cuffed the driver and checked for vitals. *Id.* He did not feel a pulse or any breathing. *Id.* The driver was later identified to be Jason Scott Wilkinson. Dkt. 26, Declaration of Stewart Estes, Exh. Q ("Report of Medical Examiner"). Mr. Wilkinson died from "multiple gunshot wounds." *Id.*

Mr. Fries, the accident reconstructionist, claims that tire marks were left in the grass when the van was accelerating in the backwards arc. Fries Decl. ¶ 3(d).

> After about 25-30' of tire marks . . . there is an abrupt difference in the texture and depth of these marks. This indicates that power is no longer being supplied to the wheels. The minivan (an automatic) continues backward at idle leaving light tire marks.

Id. ¶ 3(I). Mr. Fries opines as follows:

> The four glass patterns found on the vehicle path are most likely caused by exit bullets going out the driver's side of the vehicle. The glass likely fell to within 1-3 feet from where the bullet penetrated the glass. The glass pattern indicates three shots were fired after there was no longer power to the minivan.

Id. ¶ 3(h); *see also id,* Exh. 13 (aerial view of glass pattern in relation to the van's tire marks and location).

III. DISCUSSION

A. Plaintiff's Motions to Strike

Plaintiffs move to strike Defendant Torres' references to Jason Wilkinson's Death Investigation Toxicology Report and to his criminal history. Dkt. 43 at 28. Plaintiffs argue that the legal questions before the Court turn on Officer Torres' knowledge of Mr. Wilkinson when Officer Torres employed force against Mr. Wilkinson. Dkt. 43 at 28-29. Plaintiff concludes that Defendant's reference to the toxicology report and Mr. Wilkinson's criminal history have "no bearing" on the issues before the Court and are used only to "tarnish the character" of Mr. Wilkinson. *Id.*

Defendant counters that "Plaintiff's drug use is relevant to his impaired and erratic driving, as is his criminal history." Dkt. 47 at 3. If Plaintiff's intoxication has any bearing on the questions before the Court, then the Court may consider this evidence. On the other hand, "[e]vidence of other crimes, wrongs, or acts is not admissible to prove the character of a person in order to show action in conformity therewith." Fed. R. Evid. 404(b). Moreover, Mr. Wilkinson had not been identified when Officer Torres decided to exercise deadly force. For the purposes of this motion, Defendant's reference to Mr. Wilkinson's criminal history is both inadmissible and irrelevant evidence. Therefore, the Court grants Plaintiff's motion to strike Defendant's references to Mr. Wilkinson's criminal history and denies the motion to strike the reference to his toxicology report.

Plaintiff also moves to strike the Declaration of Colleen Lines. Dkt. 49 at 13-14. Ms. Lines asserts that her car was struck by the van during the pursuit. Dkt. 34, ¶¶ 2-3. Plaintiff argues that the question before the Court "centers upon the facts known to [Officer] Torres at the

moment he began pulling the trigger" and that Officer Torres does not remember seeing this accident during the pursuit. Dkt. 49 at 13-14. The Court disagrees as only part of the Court's analysis will depend on what Officer Torres saw during the pursuit. Therefore, the Court denies Plaintiffs' motion to strike Ms. Lines' declaration.

B. Defendant Torres' Motion to Strike

Defendant Torres "moves to strike (1) unsworn and unauthenticated report of Matthew Noedel, Ex. 7 to Harlan Dec., Dkt. No. 45; and (2) Notice of Findings as to Officer Rick Torres, Ex. 6 to Harlan Dec., Dkt. No. 45." Dkt. 47 at 1-2.

1. Matthew Noedel Report

"A trial court can only consider admissible evidence in ruling on a motion for summary judgment." *Orr v. Bank of Am.*, 285 F.3d 764, 773 (9th Cir. 2002) (citations omitted). Authentication is a condition precedent to admissibility. *Id.* To authenticate documents that are submitted to support or to oppose a summary judgment motion through personal knowledge, the party must attach the documents to the affidavit of a person through whom the exhibits could be admitted into evidence at trial. *Id.* The affiant must show affirmatively that he has personal knowledge and "is competent to testify to the matters stated therein." Fed. R. Civ. P. 56(e).

Plaintiff has submitted a "[s]hooting scene examination and reconstruction" report by Matthew Noedel and his curriculum vitae. Dkt. 45-7. Plaintiffs, however,

attached these documents to the Declaration of Beau Harlan, Plaintiffs' attorney. *See* Dkt. 45, P 2. Plaintiffs have neither submitted an affidavit of Mr. Noedel nor shown how these documents could be admitted into evidence through Mr. Harlan. Therefore, the Court grants Defendant's motion to strike these documents.

2. Notice of Findings

Authentication is not a condition precedent for domestic public documents under seal. Fed. R. Evid. 902(1). Moreover, public documents are not excluded by the hearsay rule. Fed. R. Evid. 803(8).

Plaintiffs submitted a document titled "Notice of Findings" that was issued under the official seal of the City of Vancouver Police Department and appears to be signed by Assistant Chief Mitch Barker. The Court declines to accept Defendant's argument that this document is unauthenticated hearsay.

Defendant Torres also argues that the contents of the document are irrelevant based on the legal issues before the Court. Dkt. 47 at 2. The document shows that, after an internal investigation, Officer Torres initiated a pursuit of Mr. Wilkinson in violation of department guidelines. *See* Dkt. 45-6 at 3. Defendant asserts that "[w]hether a provision of a policy manual was violated is irrelevant to the question of whether [Mr.] Wilkinson's *constitutional rights* were violated." Dkt. 47 at 2 (emphasis in original). The Court agrees. *See Case v. Kitsap County Sheriff's Dep't*, 249 F.3d 921, 929-30 (9th Cir. 2001). Moreover, based on the record before the Court, the decision on whether to initiate the pursuit is most likely insignificant in light of the

decisions regarding whether to end the pursuit. Therefore, the Court grants Defendant Torres' motion to strike the "Notice of Findings" because the finding that Officer Torres violated a department guideline is irrelevant to the questions of constitutional violations and qualified immunity.

C. Summary Judgment

Defendants Torres and Key move for summary judgment based on the doctrine of qualified immunity. Dkt. 25; Dkt. 28. Defendant Torres also moves for summary judgment on the grounds that "Plaintiffs parents' claims are not legally viable." Dkt. 25 at 12-33.

1. Standard

Summary judgment is proper only if the pleadings, the discovery and disclosure materials on file, and any affidavits show that there is no genuine issue as to any material fact and that the movant is entitled to judgment as a matter of law. Fed. R. Civ. P. 56(c). The moving party is entitled to judgment as a matter of law when the nonmoving party fails to make a sufficient showing on an essential element of a claim in the case on which the nonmoving party has the burden of proof. *Celotex Corp. v. Catrett*, 477 U.S. 317, 323, 106 S. Ct. 2548, 91 L. Ed. 2d 265 (1985). There is no genuine issue of fact for trial where the record, taken as a whole, could not lead a rational trier of fact to find for the nonmoving party. *Matsushita Elec. Indus. Co. v. Zenith Radio Corp.*, 475 U.S. 574, 586, 106 S. Ct. 1348, 89 L. Ed. 2d 538 (1986) (nonmoving party must present specific, significant probative evidence, not simply "some metaphysical doubt"). *See also* Fed. R. Civ. P.

56(e). Conversely, a genuine dispute over a material fact exists if there is sufficient evidence supporting the claimed factual dispute, requiring a judge or jury to resolve the differing versions of the truth. *Anderson v. Liberty Lobby, Inc.*, 477 U.S. 242, 253, 106 S. Ct. 2505, 91 L. Ed. 2d 202 (1986); *T.W. Elec. Serv., Inc. v. Pac. Elec. Contractors Ass'n*, 809 F.2d 626, 630 (9th Cir. 1987).

The determination of the existence of a material fact is often a close question. The Court must consider the substantive evidentiary burden that the nonmoving party must meet at trial -- e.g., a preponderance of the evidence in most civil cases. *Anderson*, 477 U.S. at 254; *T.W. Elec. Serv., Inc.*, 809 F.2d at 630. The Court must resolve any factual issues of controversy in favor of the nonmoving party only when the facts specifically attested by that party contradict facts specifically attested by the moving party. The nonmoving party may not merely state that it will discredit the moving party's evidence at trial, in the hopes that evidence can be developed at trial to support the claim. *T.W. Elec. Serv., Inc.*, 809 F.2d at 630 (relying on *Anderson, supra)*. Conclusory, nonspecific statements in affidavits are not sufficient, and missing facts will not be presumed. *Lujan v. Nat'l Wildlife Fed'n*, 497 U.S. 871, 888-89, 110 S. Ct. 3177, 111 L. Ed. 2d 695 (1990).

2. Qualified Immunity

"[G]overnment officials performing discretionary functions generally are shielded from liability for civil damages insofar as their conduct does not violate clearly established statutory or constitutional rights of which a reasonable person would have known." *Harlow*

v. Fitzgerald, 457 U.S. 800, 818, 102 S. Ct. 2727, 73 L. Ed. 2d 396 (1982). The immunity is "immunity from suit rather than a mere defense to liability." *Mitchell v. Forsyth*, 472 U.S. 511, 526, 105 S. Ct. 2806, 86 L. Ed. 2d 411 (1985).

In resolving questions of qualified immunity, courts are required to resolve a "threshold question: Taken in the light most favorable to the party asserting the injury, do the facts alleged show the officer's conduct violated a constitutional right?" *Saucier v. Katz*, 533 U.S. 194, 201, 121 S. Ct. 2151, 150 L. Ed. 2d 272 (2001). If the court finds a violation of a constitutional right, "the next, sequential step is to ask whether the right was clearly established . . . in light of the specific context of the case." *Id.* This sequence, however, is no longer the mandatory procedure that a district court must implement when considering the shield of qualified immunity. *See Pearson v. Callahan*, 555 U.S. ___, 129 S. Ct. 808, 172 L. Ed. 2d 565 (2009). The district court may "determine the order of decisionmaking that will best facilitate the fair and efficient dispostion of each case." *Id.*, slip opinion at 11-17.

a. Fourth Amendment

Plaintiffs assert that Officer Torres violated Jason Wilkinson's Fourth Amendment right to be free from unreasonable seizure.

i. Constitutional Violation

Plaintiffs' excessive force claim is governed by the Fourth Amendment because "apprehension by the use of deadly force is a seizure subject to the

reasonableness requirement of the Fourth Amendment." *Tennessee v. Garner*, 471 U.S. 1, 7, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). "Under the Fourth Amendment, officers may only use such force as is objectively reasonable under the circumstances." *Boyd v. Benton County*, 374 F.3d 773, 778 (9th Cir. 2004). "Determining whether a particular use of force is reasonable requires the fact-finder to balance the nature and quality of the intrusion on the individual's Fourth Amendment interests against the countervailing government interests at stake." *Id.* at 778-779. Accordingly, "[t]his balance must be judged from the perspective of a reasonable officer on the scene, rather than with the 20/20 vision of hindsight. The need for such balancing means that summary judgment in excessive force cases should be granted sparingly." *Id.* Consideration of "reasonableness must embody allowance for the fact that police officers are often forced to make split-second judgments in circumstances that are tense, uncertain, and rapidly evolving about the amount of force that is necessary in a particular situation." *Jackson v. City of Bremerton*, 268 F.3d 646, 651 (9th Cir. 2001).

"The use of deadly force to prevent the escape of all felony suspects, whatever the circumstances, is constitutionally unreasonable." *Tennessee v. Garner*, 471 U.S. 1, 11, 105 S. Ct. 1694, 85 L. Ed. 2d 1 (1985). However, if "there is probable cause to believe that [a suspect] has committed a crime involving the infliction or threatened infliction of serious physical harm, deadly force may be used if necessary to prevent escape, and if, where feasible, some warning has been given." *Id.* at 11-12. "[W]hen there is objective reason to fear for one's safety . . ., but not one's life, then force short of deadly

force might be justified; to justify deadly force, an objective belief that an imminent threat of death or serious physical harm is required." *Price v. Sery*, 513 F.3d 962, 969 (9th Cir. 2008).

In this case, taking the facts in the light most favorable to Plaintiffs, Officer Torres fired three bullets at Jason Wilkinson "after there was no longer power to the minivan." Fries Decl. ¶ 3(h). There at least exists a question of fact whether Mr. Wilkinson posed an "imminent threat of death or seriously bodily harm" when the van stopped accelerating. Further, it is undisputed that when Officer Torres fired, the van was always moving in a backward direction away from Officer Key. Although Defendant Torres argues that "it was obvious to any reasonable person that [the van] would come right back towards Officer Key," Dkt. 47 at 12, the van would have had to avoid both the telephone pole as well as Officer Shanaker's vehicle before it could have threatened Officer Key. Moreover, the record contains evidence that, while Officer Torres was shooting at Mr. Wilkinson, Officer Key had reached his feet and was "out of the way of the car so he wouldn't get ran [sic] over." *See supra.*

Therefore, the Court denies Defendant Torres' motion for summary judgment on the issue of whether his use of deadly force was reasonable. The Court finds that questions of fact exist as to whether Mr. Wilkinson posed an imminent threat throughout the shooting that would justify the use of deadly force.

ii. Clearly Established Constitutional Right

The next step under *Saucier* in determining if Officer

Torres is protected by qualified immunity, is to ascertain if Mr. Wilkinson's constitutional right was clearly established at the time of the injury. *Saucier*, 533 U.S. at 201. In excessive force cases, the inquiry is whether "under the circumstances, a reasonable officer would have had fair notice that the force employed was unlawful, and whether any mistake to the contrary would have been unreasonable." *Boyd*, 374 F.3d at 781; *Drummond v. City of Anaheim*, 343 F.3d 1052, 1060 (9th Cir. 2003).

When viewing the facts in the light most favorable to Plaintiffs, a reasonable officer would have had fair notice that deadly force was not justified to seize Mr. Wilkinson after the van was no longer under the control of Mr. Wilkinson. The very issues of fact that preclude summary judgment on the constitutional right question also preclude summary judgment on the fair notice question: was it reasonable for Officer Torres to believe throughout the shooting that Mr. Wilkinson posed an imminent threat of death or serious bodily harm? If Officer Torres observed Officer Key jumping up and moving away from the van, then Officer Torres should not have shot at a van moving in the opposite direction. Most importantly, the trier of fact could conclude that Officer Torres shot at the driver of a van that was no longer under power and that a coasting van did not pose a risk of death or serious injury to either Officer Torres or Officer Key.

Therefore, the Court denies Defendant Torres' motion for summary judgment on the issue of whether Officer Torres violated a clearly established constitutional right.

b. Failure to Intercede

Plaintiffs assert that liability attaches to Officer Key because he "had the ability to intercede and prevent [Officer Torres'] continued use of" force. Complaint, ¶ 7.2. The Supreme Court determined that officers do have a duty to intercede as follows:

> when the State takes a person into its custody and holds him there against his will, the Constitution imposes upon it a corresponding duty to assume some responsibility for his safety. . . . [An] affirmative duty to protect arises . . . from the limitation which [the state] has imposed on his freedom to act on his own behalf.

United States v. Reese, 2 F.3d 870, 887-88 (9th Cir. 1993) (citing *DeShaney v. Winnebago County Dep't. of Soc. Servs.*, 489 U.S. 189, 199-200, 109 S. Ct. 998, 103 L. Ed. 2d 249, (1989)). A "special relationship" which includes a duty to protect arises when the state has taken the person into custody. *Id.* at 888; *Ting v. United States*, 927 F.2d 1504, 1511 (9th Cir. 1991).

In the Rodney King case the Ninth Circuit acknowledged that "[p]ursuant to a long line of civil cases, police officers have a duty to intercede when their fellow officers violate the constitutional rights of a suspect or other citizen." *United States v. Koon*, 34 F.3d 1416, 1447 n. 25 (9th Cir. 1994), *vacated in part on other grounds by Koon v. United States*, 518 U.S. 81, 116 S. Ct. 2035, 135 L. Ed. 2d 392 (1996). Citing to several out-of-circuit cases, the Ninth Circuit noted that:

> the constitutional right violated by the passive defendant is analytically the same as the right violated by the person who strikes the blows. Thus an officer who failed to intercede when his colleagues were depriving a victim of his Fourth Amendment right to be free from unreasonable force in the course of an arrest would, like his colleagues, be responsible for subjecting the victim to a deprivation of his Fourth Amendment rights.

Id.; see also Reese, 2 F.3d at 890 (determining that a defendant officer was liable for not intervening when reasonable steps could have prevented the excessive force, and when the defendant "deliberately chose not to act"). However, "officers can be held liable for failing to intercede *only if they had an opportunity to intercede.*" *Cunningham v. Gates*, 229 F.3d 1271, 1289 (9th Cir. 2000) (emphasis added).

Defendant Key argues that Officer Torres did not violate Mr. Wilkinson's constitutional right and, therefore, he had no duty to intercede to prevent the use of unreasonable force. Dkt. 28 at 11. The Court, however, has found that there exists material questions of fact regarding whether Officer Torres' use of deadly force violated Mr. Wilkinson's constitutional right to be free from unreasonable seizure. *See supra.* Thus, the Court will only address Defendant Key's argument that he did not have a reasonable opportunity to intercede.

Plaintiffs argue that, taking the facts "in the light most favorable to Plaintiff, [Officer] Key had 'a reasonable opportunity' to stop [Officer] Torres from" using deadly force against Mr. Wilkinson. Dkt. 49 at 13. This

conclusion is unsupported by the record. It is undisputed that Officer Key either fell down or was knocked down by the van. It is also undisputed that Officer Key was sprayed with mud from the tires of the van as it accelerated backwards, away from Officer Key. Although the record is unclear as to the period of time that may have elapsed between when Officer Key allegedly reached his feet and when Officer Torres began to shoot at Mr. Wilkinson, it is unreasonable to conclude that, in that period of time, Officer Key should have interceded to prevent Officer Torres from firing his weapon. Moreover, this is not a situation where Officer Key could be considered a tacit collaborator. *See O'Neill v. Krzeminski*, 839 F.2d 9, 12 (2nd Cir. 1988) ("three blows were struck in such rapid succession that [the other officer] had no realistic opportunity to attempt to prevent them."). Officer Torres shot in rapid succession with a short pause between the two volleys of bullets. It is unreasonable to place a duty on Officer Key to assess the situation in that amount of time, conclude that shooting the driver would have been an unreasonable use of deadly force, and then somehow intercede to prevent Officer Torres either from continuing to fire the first volley of bullets or from not firing the second volley of bullets.

Therefore, the Court grants Defendant Key's motion for summary judgment because he did not have a reasonable opportunity to intercede in Officer Torres' use of deadly force against Mr. Wilkinson.

c. Due Process

Plaintiffs Scott Wilkinson and Alisha White assert that Officer Torres violated their Fourteenth Amendment

due process right to associate with their son, Jason Wilkinson. "[A] parent has a constitutionally protected liberty interest under the Fourteenth Amendment in the companionship and society of his or her child . . . ." *Curnow v. Ridgecrest Police*, 952 F.2d 321, 325 (9th Cir. 1991). The Supreme Court has made it clear that only official conduct that "shocks the conscience" is cognizable as a due process violation. *See County of Sacramento v. Lewis*, 523 U.S. 833, 846, 118 S. Ct. 1708, 140 L. Ed. 2d 1043 (1998).

In *Lewis*, the Court recognized the police officer's dilemma:

> A police officer deciding whether to give chase must balance on one hand the need to stop a suspect and show that flight from the law is no way to freedom, and, on the other, the high-speed threat to everyone within stopping range, be they suspects, their passengers, other drivers, or bystanders.

Id. at 853. In such cases, a plaintiff "must demonstrate that [the officer] acted with a purpose to harm [the suspect] that was unrelated to legitimate law enforcement objectives." *Porter v. Osborn*, 546 F.3d 1131, 1137 (9th Cir. 2008). A purpose to harm may be found in the "rare situations where the nature of an officer's deliberate physical contact is such that a reasonable factfinder would conclude the officer intended to harm, terrorize or kill." *Id.* at 1141 (quoting *Davis v. Township of Hillside*, 190 F.3d 167, 174 (3d Cir. 1999) (McKee, J., concurring)).

The parties do not dispute that this standard of

culpability was clearly established at the time of the shooting in 2005. Thus, whether Officer Torres is entitled to qualified immunity on summary judgment turns on whether Plaintiffs can present facts that would justify a jury finding that Officer Torres acted with an unconstitutional purpose to harm Jason Wilkinson. *See Porter*, 546 F.3d at 1140.

Defendant argues that Plaintiffs must show that Officer Torres "intended to harm the parent-child relationship." Dkt. 25 at 32. Defendant concludes that Officer Torres is not liable because Plaintiffs cannot show that he was "aware that Jason Wilkinson had a relationship with his parents." *Id.* Defendant has provided no binding authority for this proposed element of liability. Neither the Supreme Court in *Lewis* nor the Ninth Circuit in *Porter* included actual knowledge of the parental relationship as an element of the constitutional violation. Defendant's argument is therefore without merit.

Plaintiffs argue as follows:

> Taking the facts in the light most favorable to the plaintiffs, there is no question that Torres acted with the unconstitutional purpose to harm, terrorize and in fact, kill Wilkinson. After Key walked to the front of the minivan and the minivan began to back away from the telephone pole, Key and Torres looked at each other, seemingly acknowledged each other; then Torres walked to the passenger side of the minivan and effectively executed Wilkinson by shooting him eleven times at close range. Torres shot Wilkinson when the minivan was traveling at a

> slow speed in the exact opposite direction from where Key stood. Even after Wilkinson dropped his hands from the steering wheel and slumped in the driver's seat mortally wounded, Torres continued to fire into Wilkinson as the minivan coasted in reverse.

Dkt. 43 at 27. Based on this version of the events, which is supported by admissible evidence, a reasonable factfinder could conceivably conclude that Officer Torres intended to harm, terrorize or kill Jason Wilkinson and therefore acted beyond the scope of a legitimate law enforcement objective.

Therefore, the Court denies Defendant Torres' motion for summary judgment on Plaintiffs' claim against him for violation of constitutional due process.

IV. ORDER

Therefore, it is hereby

ORDERED that Defendant Torres' Motion for Summary Judgment (Dkt. 25) is **DENIED without prejudice** and Defendant Key's Motion for Summary Judgment (Dkt. 28) is **GRANTED.**

DATED this 23rd day of January, 2009.

/s/ Benjamin H. Settle

BENJAMIN H. SETTLE
United States District Judge

9/7/2010

No. 09-35098

UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

SCOTT WILKINSON, in his individual capacity and as Executor of the Estate of Jason Scott Wilkinson; ALISHA WHITE, an individual; ESTATE OF JASON SCOTT WILKINSON, Plaintiffs-Appellees,

v.

RICK TORRES, individually and as City of Vancouver Police Officer, Defendant-Appellant.

ORDER

Before: TASHIMA and TALLMAN, Circuit Judges, and MARSHALL, District Judge. *

Judge Tallman votes to deny the petition for rehearing en banc and Judge Tashima so recommends. Judge Marshall rcommends that the petition for rehearing en banc be granted. The full court has been advised of the petition for rehearing en banc and no judge of the court has requested a vote on en banc rehearing. *See* Fed. R. App. P. 35(f).

The petition for rehearing en banc is denied.

Footnote

*The Honorable Consuelo B. Marshall, Senior United States District Judge for the Central District of California, sitting by designation.